



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

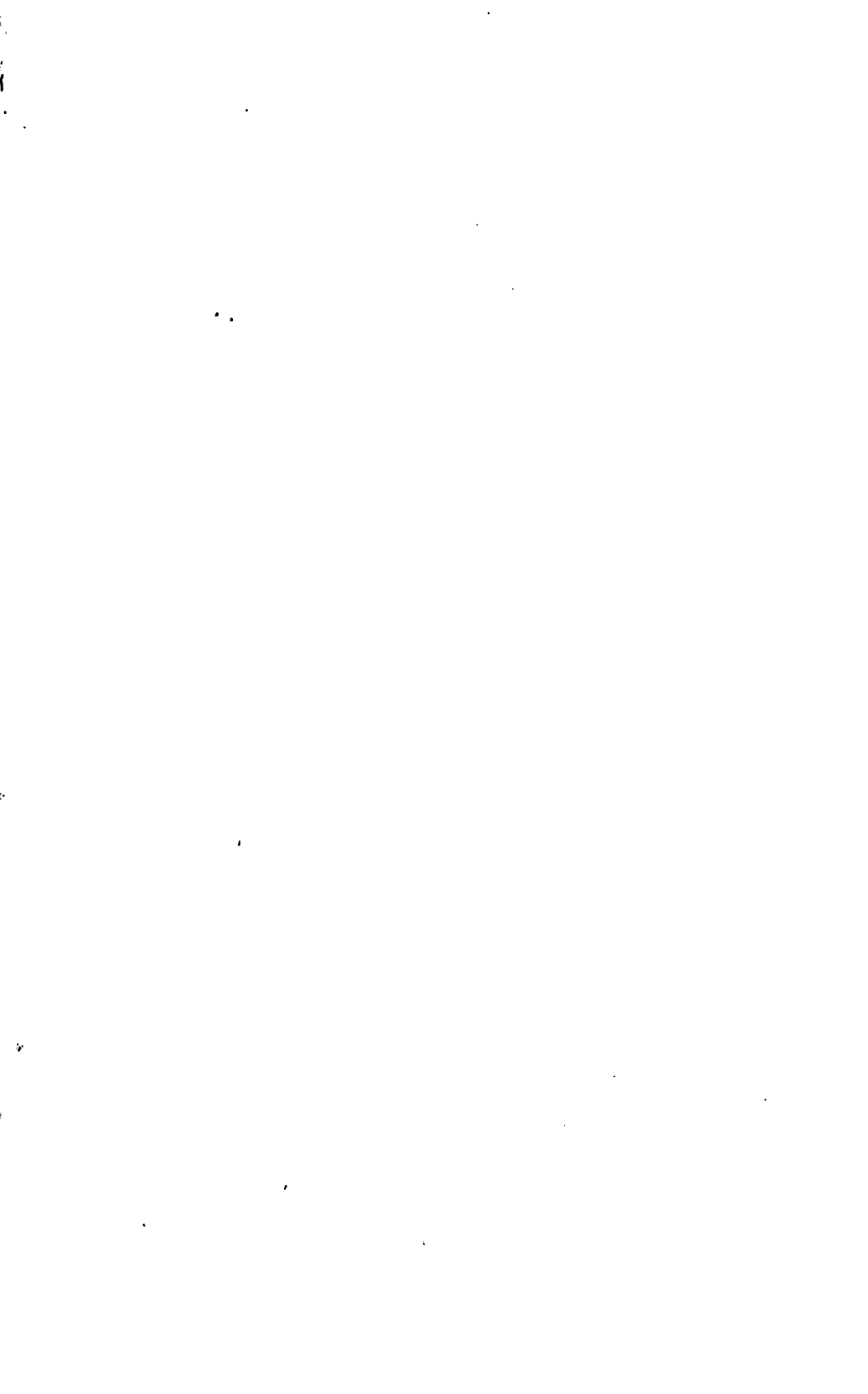
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARV

LIBRARY



aug 3

48

CIVIL
PROCEDURE REPORTS.
CONTAINING CASES UNDER THE
CODE OF CIVIL PROCEDURE
AND
THE GENERAL CIVIL PRACTICE
OF THE
STATE OF NEW YORK.

REPORTED WITH NOTES
BY
HENRY H. BROWNE
OF THE NEW YORK BAR.

WITH A REFERENCE TO THE SECTIONS OF THE CODE OF CIVIL PRO-
CEDURE CONSTRUED OR CITED IN THE OPINIONS CONTAINED IN
THE FOLLOWING REPORTS, ISSUED DURING THE PERIOD COV-
ERED BY THIS VOLUME : NEW YORK REPORTS, VOLS. 91,
92, 93 ; DEMAREST'S REPORTS, VOL. 1 ; HUN'S RE-
PORTS, VOL. 80 ; ABBOTT'S NEW CASES, VOL. 12 ;
HOWARD'S PR. VOL. 65 ; N. Y. SUPERIOR
COURT REPORTS, VOL. 48, AND N. Y.
CIVIL PRO. REPORTS, VOL. 4.

VOLUME IV.

NEW YORK:
S. S. PELOUBET,
LAW PUBLISHER AND BOOKSELLER,
80 NASSAU STREET.
1884.

COPYRIGHT.

S. S. PELOUBET,

1884.

Rec. Apr. 1, 1884

CONTENTS.

Sections of the Code of Civil Procedure. }		Page
8 <i>et seq.</i> 14	DOYLE <i>v.</i> DOYLE.....	265
	Sheriff's fees, by whom paid, in proceeding to punish for contempt.	
14, 15	HALL <i>v.</i> U. S. REFLECTOR CO.....	148
	When motion to punish party after a contempt in failing to pay costs, etc., of attachment as re- quired by order will be denied.	
66	<i>In re</i> BAILEY	140
	When attorney's right to costs absolute and not to be defeated by payment to judgment creditor.	
66	ALBERT PALMER CO. <i>v.</i> VAN ORDEN	44
	Attorney's lien for cos's; mode of enforcing it.	
74	FOWLER <i>v.</i> CALLAN.....	418
	Attorney. What constitutes champerty.	
102	STEFFIN <i>v.</i> STEFFIN.....	179
	The plaintiff in an execution cannot maintain an action to prevent or recover for the taking away and conversion of property levied upon there- under by the sheriff, but he may maintain an action to remove an obstruction to its orderly en- forcement and in aid of it.	
110 <i>et seq.</i>	DOYLE <i>v.</i> DOYLE	265
	Section 110 <i>et seq.</i> of the Code does not apply to proceedings to punish for civil contempt.	
181, 182	WERCKMAN <i>v.</i> WERCKMAN.....	146
	Sentence to State prison for term less than life does not deprive prisoner of right to defend action against him.	
338	NEMLY <i>v.</i> McGRANDLE.....	327
	Attachment cannot issue out of N. Y. City Court to sheriff of any county other than New York.	
421, 422	KRAUSE <i>v.</i> AVERILL.....	410

Sections of the Code of Civil Procedure. }		Page
	What notice of appearance sufficient. Order extending time to answer valid although defendant has not appeared.	
438, 439	GREENBAUM v. DWYER.....	276
	Letter or papers referred to in affidavit to obtain order for service by publication should be annexed.	
446, 448	DANAHER v. CITY OF BROOKLYN.....	286
	One cannot bring an action as administrator, etc., of two persons for damages for causing their death.	
448	SMITH v. DAVIS.....	158
	Prior mortgagee properly made defendant in action for foreclosure of mortgage for the purpose of determining amount due on his mortgage.	
448	SMITH v. CRISSEY....	438
	Person claiming money necessary party defendant in action against municipal corporation to restrain its payment.	
451	SKOOG v. N. Y. NOVELTY Co.....	144
	When summons may be amended by inserting real names of defendants in place of fictitious name.	
458, 460	IRVING v. GARRITY.....	105
	An infant may sue in <i>forma pauperis</i> .	
481	MORRISON v. LEWIS	437
	Ownership of property in action of replevin when may be implied.	
481	PRICKHARDT v. ROBERTSON.....	112
	MUSER v. ROBERTSON.....	112
	The facts which must be stated in a pleading are ultimate facts only.	
481 <i>subd.</i> 8	DUSENBURY v. DUSENBURY.....	126
	A party may, in his complaint demand any relief to which he deems himself entitled, but he is thereby precluded from declining to take any part thereof, or from demanding aught additional supported by the facts.	
488	SMITH v. DAVIS.....	158
	When complaint not amenable to objection that there is a defect of parties defendant.	
488	DANAHER v. CITY OF BROOKLYN.....	286
	Two causes of action for damages for causing death cannot be united in same complaint.	

CONTENTS.

v

Sections of the Code of Civil Procedure. }		Page
488, <i>et seq.</i>	BEAL v. UNION PAPER BOX Co.	18
	Instance of demurrer which was not frivolous.	
495	BELL v. LESBINI	367
	Demurrer to counter-claim.	
500	CLARK v. DILLON	245
	If a material allegation is not directly denied, the Court is warranted in assuming that no issue is made. Instance of insufficient denial.	
500	LUCE v. ALEXANDER	428
	Denial in answer when insufficient.	
500	SHELDON v. SABIN	4
	Instance of an insufficient denial in an answer.	
501	BELL v. LESBINI	367
	In action on contract a counter-claim founded in tort and not arising out of the facts stated in the complaint, cannot be set up.	
519	PRICKHARDT v. ROBERTSON	112
	MUSER v. ROBERTSON	112
	Construction of pleadings.	
531	STEVENS v. WEBB	64
	Bill of particulars; object of; when not ordered.	
531	TRAIN v. FRIEDMAN	109
	A bill of particulars will not be ordered where it appears that the defendant who seeks it has more knowledge of the particulars sought than the plaintiff.	
531	CLAFLIN v. SMITH	240
	Instance of an action in which a bill of particulars should be required.	
531	MASTERSON v. THE MAYOR	317
	When right to bill of particulars lost by laches.	
531	TOWNSEND v. N. Y. LIFE INS. Co.	393
	Rule as to pleading account and failure to serve, does not apply to reference of claim against administrator.	
531	BEAL v. UNION PAPER BOX Co.	18
	At least five days' notice of motion for judgment on frivolous pleading must be given; Court cannot shorten such time; affidavits cannot be used on such motion.	
544	TIFFT v. BLOOMBERG	349
	Supplemental answer when allowed.	
545	HAGERTY v. ANDREWS	323
	What matter in pleading, is irrelevant and	

Sections of the Code of Civil Procedure. }		Page
	redundant. Propriety of making party defendant cannot be determined on motion to strike out allegations in complaint referring to him.	
549	LAWRENCE v. FOXWELL.....	840
	Pleading in action to enforce liability fraudulently contracted.	
549	UNITED STATES v. REID.....	1
	Value of goods forfeited for false entry, when recovered, not a penalty. Contract, in action on which defendant may be arrested under section 549 of the code, must be between party and party, not that general contract between members of society to support the laws implied from living under them.	
549 sub. 4	LAWRENCE v. FOXWELL.....	851
	When order of arrest in action on debt fraudulently contracted must be vacated unless it appears that the contract has been waived.	
559	GODFREY v. PELL.....	448
	Order of arrest; undertaking on granting; jurisdiction. Irregularity how waived.	
580, 581	LEWIS v. STEVENS.....	224
	When bail has once been duly allowed, the allowance cannot be vacated.	
690	PRATT v. UNDERWOOD.....	167
	Order restraining defendant from interfering with, etc., partnership property pending action to dissolve partnership cannot be granted unless plaintiff gives security.	
636	SMADBECK v. SISSON.....	353
	Attachment granted in action began simultaneously with completion of work for which it was brought should be vacated, unless there are special circumstances showing breach of contract.	
636	REILLY v. SISSON.....	361
	Same subject.	
636	MERSON v. LEONARD SCOTT PUBLISHING Co.....	319
	Attachment cannot be issued out of the City Court of New York against a domestic corporation.	
640	SHELDON v. BABIN.....	4
	Where an attachment was vacated in part only, the sureties, on the undertaking to procure it, did not become liable for damages, and this although	

CONTENTS.

vii

Sections of the
Code of Civil Procedure. }

Page

	it was sustained in part because a portion of the property attached had been sold under execution in the same action.	
641	NEELY v. McGRANDLE.....	327
	N. Y. City Court has not power to issue attachment to sheriff of any county other than N. Y.	
641, 644	PLIMPTON v. BIGELOW.....	189
647, 649	Shares of stock in a foreign corporation, when cannot be attached.	
650, 651	EAS v. TOPLANYI.....	173
	Extent of the examination of a person having property in his possession belonging to the defendant in an attachment.	
689	SHELDON v. SABIN.....	4
	Effect of partial vacation of attachment on undertaking.	
707, 708	PLACE v. RILEY.....	393
	Form of execution where summons served by publication.	
709	BOWE v. U. S. REFLECTOR Co.....	154
	Sheriff has lien upon attached property, after vacation of the attachment for his fees, etc., and is not obliged to deliver it to defendant until they are paid.	
709	HALL v. U. S. REFLECTOR Co.....	148
	When motion to compel sheriff to deliver attached property to defendant upon vacation of attachment will be denied.	
713, subd. 1	DUSENBURY v. DUSENBURY.....	126
	Receiver should not be appointed on concurrent demands in answer and reply in a case where the code does not authorize appointment of receiver.	
713, 715	PRATT v. UNDERWOOD.....	167
	Instance of an action to dissolve the co-partnership in which a receiver was properly appointed.	
715	TITUS v. FAIRCHILD.....	418
	Bond to officer, when not forbidden by 8 R. S. 448 § 49.	
723	SKOOG v. N. Y. NOVELTY Co.....	144
	Amending summons by inserting real name of defendants sued by name under which they did business.	
733	DAVIES v. THE MAYOR.....	290
	Offer of judgment, when accepted, is bar to new	

Sections of the Code of Civil Procedure. }		Page
	action for claim, or part of claim, set out in complaint.	
755	DALTON v. SANDLAND.....	73
	When action does not abate.	
756	McNAMARA v. HARRIS.....	76
	In case of transfer of interest <i>pendente lite</i> action may be continued by original party; the substitution of the transferee is in the discretion of the court.	
757	DALTON v. SANDLAND.....	78
	When action not abated by death of defendant, both parties have an absolute right to continue it.	
772	In re NATIONAL TRUST Co.	204
	Application to vacate, modify or resettle an order to whom made.	
791, 798	ANGLE v. KAUFMAN.....	201
	Preferences under the general rules of practice are governed by Section 798 of the Code.	
808, et seq.	DICKIE v. AUSTIN.....	123
	Petition for discovery of books must state what information is wanted, and that the books contain it.	
814	TITUS v. FAIRCHILD.....	418
	Orders as evidence in suits on receiver's bond.	
828	GREISMANN v. DREYFUS....	83
	Examination of party before trial.	
837	WALKER v. DUNLEVY (note).....	88
	Order for examination of party before trial should not be granted where it will necessarily compel party to invoke protection of court.	
870	ANDREWS v. KEENE.....	830
	When examination of party before trial not allowed in action for tort.	
870	FUNK v. TRIBUNE ASSOCIATION.....	408
	When plaintiff in action for libel may be examined before trial.	
870, et seq.	GREISMANN v. DREYFUS.....	82
	The fact that questions may be put on examination of party before trial which will tend to criminate the witness affords no justification for his refusal to be sworn.	
870, et seq.	WALKER v. DUNLEVY (note).....	88
	Order for examination of party before trial should not be granted in action where the only issue is	

CONTENTS.

ix

Sections of the Code of Civil Procedure. }	Page
the criminality of the witness sought to be examined.	
870, <i>et seq.</i> FOGG <i>v.</i> FISK.....	844
Party cannot be examined before trial at instance of adverse party in U. S. Circuit Court. Such examination if begun in State Court prior to removal of action to the U. S. Circuit Court may be continued.	
870, 872 BRIGGS <i>v.</i> TAYLOR.....	828
When party may be examined at his own instance before trial.	
880 WALKER <i>v.</i> DUNLEVY (<i>note</i>).....	88
Examination not allowed when it will necessarily tend to criminate party examined.	
880 GREISMANN <i>v.</i> DREYFUS.....	82
Objection that evidence of party on his examination before trial will tend to criminate him can only be urged against a specific question.	
880 FUNK <i>v.</i> TRIBUNE ASSOCIATION.....	408
Questions which tend to criminate or render infamous party examined before trial should not be allowed and he should not be required to plead his privilege as an excuse for not answering them.	
881, 883 FOGG <i>v.</i> FISK.....	844
Testimony on examination of party before trial when and how used in action removed to U. S. Circuit Court.	
885 ATTORNEY GENERAL <i>v.</i> CONTINENTAL LIFE INS. Co.	214
Order for taking deposition to be used on motion cannot be granted on the application of any one not a party to the action.	
886 GUSTAF <i>v.</i> AMERICAN STEAMSHIP Co.....	242
Examination of party before trial. Party residing in State cannot be examined in county other than that in which he resides or has a place of business.	
1013 STEBBINS <i>v.</i> COWLES.....	302
Action by attorney for professional services; when referable. Review of discretionary order.	
1013 HULL <i>v.</i> ALLEN.....	300
Same subject. Instance of such an action which should not be referred.	
1021 THOMPSON <i>v.</i> SCHIEFFELIN.....	270
Order overruling demurrer as frivolous not appealable.	

CONTENTS.

Sections of the Code of Civil Procedure. }		Page
1204, 1205	LUCH <i>v.</i> ALEXANDER.....	428
	Where bond was given on opening default condition- ed for "the payment of any judgment which plaintiff may recover," and he recovered two judgments therein, one against all defendants and another against one, payment of the first judg- ment will not release sureties to bond.	
1207	DUSENBURY <i>v.</i> DUSENBURY.....	126
	Court when controlled in awarding judgment by relief demanded in complaint.	
1241	HALL <i>v.</i> U. S. REFLECTOR Co.....	148
	Punishing for contempt in failing to pay costs, etc., as required by order.	
1219	ESTATE OF BULLARD, DECEASED.....	284
	When appeal from decree of surrogate, fixing the sum to the income of which a legatee was en- titled, does not stay the execution of the decree so far as it directed the payment of the income for the first year.	
1327, 1331	GROW <i>v.</i> SNELL....	334
	Undertaking to stay execution of judgment of for- closure and sale an appeal therefrom.	
1347,	<i>In re</i> NATIONAL TRUST Co.....	204
	Who may vacate, modify or resettle an order.	
1365	CUPFER <i>v.</i> FRANK.....	53
	When execution may issue of course.	
1370	PLACE <i>v.</i> RILEY.....	393
	When summons served by publication on ground that resident debtor concealed himself, &c., execu- tion, if it does not go against personal property not attached, is void.	
1375	CUPFER <i>v.</i> FRANK.....	53
	Execution may be issued of course within five years after right to issue has fully accrued.	
1391	KEIHER <i>v.</i> SHIPHERD.....	274
	Share in New York Law Institute owned by prac- ticing lawyer, when exempt from judgment cred- itor.	
1405	STEFFIN <i>v.</i> STEFFIN.....	179
	Effect of the issuing of an execution and of a levy thereunder.	
1487	UNITED STATES <i>v.</i> REID	1
	Execution properly issued out of U. S. circuit court on judgment recovered in U. S. district	

CONTENTS.

xi

Sections of the Code of Civil Procedure.		Page
	court, and affirmed on writ of error in the circuit court.	
1538	SCHEU v. LEHNING.....	885
	Action for partition cannot be maintained between remainder men when actual partition cannot be had without great prejudice to owners.	
1548	HAGERTY v. ANDREWS.....	828
	When defendant must litigate title in action for partition.	
1694 et seq.	FIRST NAT'L. BANK OF OSWEGO v. DUN.....	878
	SECOND NAT'L. BANK OF OSWEGO v. DUN.....	878
	When property replevied is not in custody of law so as to prevent levy thereon under execution. Undertaking given in replevin proceedings does not secure or protect judgment creditor of defendant.	
1720	MORRISON v. LEWIS... ..	487
	Complaint in action to recover personal property procured by fraud.	
1787, 1789	BOWE v. U. S. REFLECTOR Co.....	154
	Sheriff may bring action to procure sale of attached property to satisfy his lien for fees, etc.	
1769	LEE v. LEE.....	321
	Alimony may be granted wife in action by husband to annul marriage.	
1776	BENTSON v. THINGVALLA STEAMSHIP Co.....	260
	To raise an issue as to the incorporation of a defendant, there must be an affirmative allegation that it is not a corporation.	
1781, 1782	BEECHER v. SCHIEFFELIN.....	281
	Complaint in and parties to an action to set aside an unlawful alienation of the property of a corporation made by its officers and trustees ; such action may be maintained by manager.	
2260, 2263, } 2265 }	BROADWELL v. HOLCOMBE.....	159
	Summary proceedings ; when execution of warrant in, will be enjoined.	
2386	M McNULTY v. SOOLLEY.....	250
	Agreement to arbitrate discontinues action, and that although it was not acknowledged and the arbitrators never consented to act.	
2485	CROMWELL v. SPOFFORD.....	273
	Supplementary proceedings ; second examination of judgment debtor in, not allowed when similar	

Sections of the Code of Civil Procedure. }	Page
proceeding on prior judgment between same parties is pending.	
2446 ALBRIGHT v. KEMPTON	16
Supplementary proceedings; money owing to the debtor, but not due and payable at the time an order in, was served, cannot be reached. Court has no power to make decree appropriating a debtor's future earnings to the payment of a judgment.	
2451, 2463 HANCOCK v. SEARS	255
Judgment debtor who expends his personal earnings, due before the service of an order in supplementary proceedings containing an injunction upon him, but received thereafter, for the support of his family, when not guilty of contempt.	
2463, 2464 KEIHER v. SHEPHERD	274
Motion for receivership, founded on ownership of share in New York Law Institute by judgment debtor, who is a practicing lawyer, should be denied.	
2527, 2557 } ESTATE OF HEWITT	57
2560, 2566 } Costs of appeal from surrogate's decree; surrogate has no power to award or order payment of, except as directed by the appellate court; where appellate court has awarded costs, but has made no directions as how they shall be paid, the surrogate may exercise his discretion in particulars in which the appellate court has failed to exercise it; functions of special guardian cease with entry of surrogate's decree; if special guardian recognized as guardian <i>ad litem</i> appellate court on appeal from surrogate's decree, although not regularly appointed as such, he is entitled to compensation for his services.	
2591 BROWN v. LONDON	11
If surrogate had jurisdiction to issue letters of administration they are not to be disregarded in collateral proceedings.	
2611, 2618, } ESTATE OF BOGERT	441
2623 } Testimony of subscribing witness in proceedings for probate of will not controlling; does not bind proponent. Will not be invalidated by absence of or defect in attestation clause.	

CONTENTS.

xiii

Sections of the Code of Civil Procedure. }		Page
2672	ESTATE OF FRICKE.....	177
	Extent of Surrogate's power to direct the applica- tion of money in the hands of a temporary ad- ministrator.	
2695, 2696, }	BROWNE v. LONDON	11
2697, 2702 }	Ancillary letters of administration; proof required on issuing. Such letters not void, nor to be dis- regarded in collateral proceeding, because proof on which they were granted was defective or irregular, if surrogate acquired jurisdiction. Power of attorney to receive ancillary letters of admin- istration properly acknowledged before <i>Vice Consul</i> of United States.	
2717, 2718	ESTATE OF McKIERNAN.....	218
	Administrator disputing claim should file written answer on application for order decreeing its pay- ment.	
2736	ESTATE OF SLOSSON.....	280
	Amount of commissions to testamentary trustees.	
2739, 2740	SNYDER v. SNYDER.....	370
	Claim in favor of executor against his intestate's estate can be paid only upon allowance by surro- gate, and neither he nor his assignee can maintain action thereon.	
2748	ESTATE OF ORSER.....	129
	Surrogates have power to hear and determine controversies concerning legacy or distributive share; what subscribing witness may take under will.	
2811	ESTATE OF SLOSSON.....	280
	Commissions to testamentary trustees, when allow- ed; amount of, when fund originally less than \$100,000 was increased by income to more than that sum.	
2863 subd. 4	STEELE v. MACDONALD.....	227
	To oust justice of jurisdiction in a matter of account on the ground that the accounts exceed \$400, they must exceed that sum exclusive of pay- ments on account.	
2863 subd. 4	BUNDICK v. HALE.....	811
	When account does not exceed \$400, payments on account go in extinguishment of the debt.	
8017	CUNNINGHAM v. EISEMAN.....	220
	Transcript of judgment rendered in N. Y. District	

Sections of the Code of Civil Procedure. }		Page
	Court can only be filed with County Clerk by party in whose favor judgment was rendered.	
3160	STEPHENSON v. HANSON.....	104
	What must be shown on motion in city court of New York for security for costs on ground of on residence.	
3169	MERAHON v. LEONARD SCOTT PUBLISHING Co.....	319
	Attachment cannot issue out of New York City Court against domestic corporation.	
3223	BUNDICK v. HALE	311
	Costs where plaintiff recovers less than \$50.	
3228 subd. 3	STEELE v. MACDONALD.....	227
	Costs in court of record in a matter of account when plaintiff does not recover \$50.	
3228 subd. 4	NEWCOMB v. HALE	25
3230	Costs; when the Court of Appeals reverse a judgment "with costs to abide the event," the party eventually successful recovers costs for all steps in the action; where a judgment was modified, and as modified affirmed "with costs to the appellant," "with costs" meant costs in the Court of Appeals only; the costs of an action for the foreclosure of a mortgage, wherein judgment for deficiency is awarded against a grantor of the payment of the mortgage, are in the discretion of the court.	
3251 subd. 5	MALCOLM v. HAMILL.....	221
	Argument in Court of Appeals for which costs are allowed may be either oral or written.	
3258	BARCLAY v. CULVER.....	365
	Extra allowance computed on amount involved in action.	
3253, 3254	WEED v. PAINE.....	305
	Additional allowances not limited to \$2,000 in the aggregate, but to \$2,000 to each side when both parties are successful.	
3256	HALL v. U. S. REFLECTOR Co.....	148
	Collection of sheriff's fees for executing attachment.	
3263	McNAMARA v. HARRIS.....	76
	Order continuing action in name of transferee of plaintiff's interest, should not be granted where its effect would be to defeat the legal consequences of an order requiring security for costs.	

CONTENTS.

XV

Sections of the Code of Civil Procedure. }		Page
3268	RYAN v. POTTER.....	80
	Security for costs ; in a case within 3268 of the code, defendant's right to, is absolute, unless lost by laches.	
3268	BOSTWICK v. FIFIELD.....	79
	Security for costs ; a plaintiff cannot be required to give, in the New York court of common pleas, because he is a non-resident of the county..	
3268, et seq.	NOTE ON SECURITY FOR COSTS.....	82
3268	HAYES v. SECOND AVE. R. R. Co. (note).....	84
	When right to security for costs lost by laches, court may still require.	
3268	IRVING v. GARRITY.....	105
	When order requiring infant to give security for costs will be vacated.	
3268, 3269	STEPHENSON v. HANSON.....	104
	Security for costs in city court of U. S. on ground of non-residence.	
3270	HOFFMAN v. LOWELL.....	103
	Sum deposited as security for costs to be returned to plaintiff upon rendition of judgment in his favor.	
3271	RYAN v. POTTER.....	80
	Security for costs ; under 3271 the court may, in its discretion, request plaintiff to give ; not required in action by administrator simply because the only asset of the estate is the claim in suit.	
3272	MCCALL v. FRITH.....	102
	When sum deposited as security for costs to be paid to successful party.	
3277	HOFFMAN v. RIDLEY.....	41
	When court not divested of jurisdiction of motion by entry of judgment, court has power to discon- tinue an action without costs ; it rests in sound discretion ; an infant plaintiff, unable to comply with an order requiring her to give security for costs, should be allowed to discontinue the action for personal injuries without costs.	
3307	DOYLE v. DOYLE.....	205
	Sheriff's fees in proceedings to punish for con- tempt, by whom paid.	
3307	HALL v. U. S. REFLECTOR Co.....	148

Sections of the Code of Civil Procedure. }	Page
Party paying sheriff's fees on attachment, how reimbursed if ultimately successful.	
8343 BOSTWICK v. FIFIELD	79
The New York court of common pleas belongs to the class denominated "superior city courts ;" it is a county court for certain purposes, but not within the meaning of section 8268 of the code of civil procedure.	

TABLE OF CASES REPORTED.

A.		C.	
	Page		Page
Albert Palmer Co. v. Van		Callan, Fowler v.	413
Orden	44	Clafin v. Smith	240
Albright v. Kempton	16	Clark v. Dillon	245
Alexander, Luce v.	428	Continental Life Ins. Co.,	
Allen, Hull v.	300	Attorney-General v.	214
American Steamship Co.,		Cowles, Stebbins v.	303
Gustaf v.	243	Crissey, Smith v.	432
Andrews, Hagerty v.	323	Cromwell v. Spofford	272
Andrews v. Keene	330	Culver, Barclay v.	365
Angle v. Kaufman	201	Cunningham v. Eiseman	220
Attorney-General v. Continental		Cupfer v. Frank	53
Life Ins. Co.	214		
Austin, Dickie v.	123	D.	
Averill, Krause v.	410	Dalton v. Sandland	73
		Danaher v. City of Brooklyn..	236
		Davies v. Mayor	290
		Davis, Smith v.	156
		Dickie v. Austin	123
		Dillon, Clark v.	245
		Doyle v. Doyle	265
		Dreyfus, Greismann v.	32
		Dun, First Nat'l Bank of	
		Oswego v.	373
		Dun, Second Nat'l Bank of	
		Oswego v.	373
		Dusenbury v. Dusenbury	126
		Dwyer, Greenbaum v.	276
		E.	
		Eiseman, Cunningham v.	220
		Eas v. Toplanyi	173
		F.	
		Fairchild, Titus v.	413
		Fifield, Bostwick v.	79
B.			
Bailey, <i>In re</i>	140		
Barclay v. Culver	365		
Beal v. Union Paper Box Co..	19		
Beecher v. Schieffelin	230		
Bengtson v. Thingvalla Steam-			
ship Co.	260		
Bell v. Lesbini	367		
Bigelow, Plimpton v.	189		
Bloomfield, Tift v.	349		
Bogert, Estate of	441		
Bostwick v. Fifield	79		
Bowe v. U. S. Reflector Co..	154		
Briggs v. Taylor	323		
Broadwell v. Holcombe	159		
Brooklyn, City of, Danaher v.	236		
Brown v. Landon	11		
Bullard, Estate of	234		
Bundick v. Hale	311		

xviii TABLE OF CASES REPORTED.

	Page		Page
First Nat'l Bank of Oswego v. Dun.....	878	Keiher v. Shipherd.....	274
Fisk, Fogg v.....	844	Kempton, Albright v.....	16
Fogg v. Fisk.....	844	Krause v. Averill.....	410
Fowler v. Callen.....	412		
Foxwell, Lawrence v.....	840	L.	
Foxwell, Lawrence v.....	851	Landon, Brown v.....	11
Frank, Cupfer v.....	53	Lawrence v. Foxwell.....	340
Fricke, Estate of.....	177	Lawrence v. Foxwell.....	351
Friedman, Train v.....	109	Lee v. Lee.....	321
Frith, McCall v.....	102	Lehning, Scheu v.....	385
Funk v. Tribune Association..	408	Leonard Scott Publishing Co., Mershon v.....	319
		Lesbini, Bell v.....	367
G.		Lewis, Morrison v.....	437
Garrity, Irving v.....	105	Lewis v. Stevens.....	224
Godfrey v. Pell.....	448	Lowell, Hoffman v.....	103
Greenbaum v. Dwyer.....	276	Luce v. Alexander.....	428
Greismann v. Dreyfus.....	32		
Grow v. Snell.....	384	M.	
Gusstaf v. American Steamship Co.....	248	McCall v. Frith... ..	103
		McGrandle, Neeley v.....	327
H.		McKiernan, Estate of.....	318
Hagerty v. Andrews.....	323	McNamara v. Harris.....	76
Hale, Bundick v.....	311	McNulty v. Scolley.....	250
Hale, Newcomb v.	25	Macdonald, Steele v.....	227
Hall v. U. S. Reflector Co....	148	Malcolm v. Hamill.....	221
Hamill, Malcolm v.	231	Masterson v. Mayor.....	317
Hancock v. Sears.....	255	Mayor, Davies v.....	290
Hanson, Stephenson v.....	104	Mayor, Masterson v.....	317
Harris, McNamara v.....	76	Mershon v. Leonard Scott Publishing Co.....	319
Hayes v. Second Ave. R. R. Co. (note).....	84	Morrison v. Lewis.....	487
Hewitt, Estate of.....	57	Muser v. Robertson.....	1.3
Holcombe, Broadwell v.....	159		
Hoffman v. Lowell.....	103	N.	
Hoffman v. Ridley.....	41	National Trust Co., In re....	203
Hull v. Allen.....	300	Neeley v. McGrandle.....	327
		Newcomb v. Hale.....	25
I.		N. Y. Life Ins. Co., Townsend v.....	398
Irving v. Garrity.....	105	N. Y. Novelty Co., Skoog v....	144
K.		O.	
Kaufman, Angle v.....	201	Orser, Estate of	139
Keene, Andrews v.....	330		

TABLE OF CASES REPORTED.

xix

P.		Page	Page	
Paine, Weed v.....	805	Smith v. Davis.....	158	
Pell, Godfrey v.....	448	Snell, Grow v.....	334	
Place v. Riley.....	893	Snyder v. Snyder.....	370	
Plimpton v. Bigelow.....	189	Spofford, Cromwell v.....	273	
Potter, Ryan v.....	80	Stebbins v. Cowles.....	303	
Pratt v. Underwood.....	167	Steele v. Macdonald.....	227	
Prickhardt v. Robertson.....	112	Steffin v. Steffin.....	179	
R.		Stephenson v. Hanson.....	104	
Reid, United States v.....	1	Stevens, Lewis v.....	224	
Reilly v. Sisson.....	861	Stevens v. Webb.....	64	
Ridley, Hoffman v.....	41	T.		
Riley, Place v.....	893	Taylor, Briggs v.....	328	
Robertson, Muser v.....	112	Thingvalla Steamship Co.,		
Robertson, Prickhardt v.....	112	Bengtson v.....	260	
Ryan v. Potter.....	80	Thompson v. Schieffelin.....	270	
S.		Tift v. Bloomfield.....	349	
Sabin, Sheldon v.....		Titus v. Fairchild.....	418	
Sandland, Dalton v.....	73	Toplanyi, Ess v.....	173	
Scheu v. Lehning.....	385	Townsend v. N. Y. Life Ins. Co.	398	
Schieffelin, Beecher v.....	330	Train v. Friedman.....	109	
Schieffelin, Thompson v.....	270	Tribune Association, Funk v.....	408	
Scolley, McNulty v.....	250	U.		
Sears, Hancock v.....	255	Underwood, Pratt v.....	167	
Second Ave. R. R. Co., Hayes v.		Union Paper Box Co., Beal v.	13	
(note).....	84	United States v. Reid.....	1	
Second Nat'l Bank of Oswego		U. S. Reflector Co., Bowe v....	154	
v. Dun.....	378	U. S. Reflector Co., Hall v....	143	
Sheldon v. Sabin.....	4	V.		
Shipherd, Keiher v.....	274	Van Orden, Albert Palmer		
Sisson, Reilly v.....	861	Co. v.....	44	
Sisson, Smadbeck v.....	353	W.		
Skoog v. N. Y. Novelty Co....	144	Webb, Stevens v.....	64	
Slosson, Estate of.....	280	Weed v. Paine.....	305	
Smadbeck v. Sisson.....	353	Werckman v. Werckman.....	146	
Smith, Clafin v.....	240			
Smith v. Crissey.....	433			

TABLE OF CASES CITED

IN THE OPINIONS.

Cases.	A. Where Reported.	Page Cited
Abernathy v. Abernathy.....	2 Cow. 413.....	229
Adams v. Holley.....	12 How. Pr. 326.....	121
Adee v. Campbell.....	14 Hun, 551; S. C., aff'd 79 N. Y. 52.....	184
Allen v. Patterson.....	7 N. Y. 478.....	117, 121
Ansonia Brass & Copper Co. v. Pratt.....	10 Hun, 443.....	186
Ansonia Brass & Copper Co. v. Pratt.....	74 N. Y. 400.....	185
Armstrong v. Cummings.....	20 Hun, 313.....	165

B.

Bailey v. Dean.....	5 Barb. 297.....	409
Baker v. Mathews.....	1 Dueno, 335.....	186
Ballard v. Ballard.....	18 N. Y. 491.....	236
Bank of Augusta v. Earle.....	18 Pet. [38 U. S.] 519.....	196
Bank of Havana v. Magee.....	20 N. Y. 355.....	146
Barante v. Deyermant.....	41 N. Y. 335.....	43
Barr v. King.....	96 Pa. St. 485.....	199
Barrett v. Western.....	66 Barb. 205.....	253
Baskin v. Baskin.....	48 Barb. 200; aff'd 36 N. Y. 416.....	445
Baxter v. Missouri, Kansas & Texas Ry. Co.....	67 Barb. 283.....	175
Beardsley v. Littell.....	14 Blatch. [U. S. Circ. Ct.] 102.....	346
Becker v. Becker.....	47 Barb. 497.....	275
Belmonte v. Cornen.....	83 N. Y. 256.....	279
Betts v. Betts.....	4 Abb. N. C. 442.....	283
Blossom v. Estes.....	84 N. Y. 617.....	201
Boston Mills v. Eull.....	6 Abb. N. S. 319; S. C., 37 How. Pr. 299.....	229

TABLE OF CASES CITED.

xxi

Cases.	Where Reported.	Page Cited.
Bowman v. Earl	8 Duer, 631.....	68
Brady v. Smith.....	8 Hun, 60.....	278
Brandon M'fg Co. v. Bridgman.....	14 Hun, 122.....	409
Brewster v. Hatch.....	10 Abb. N. C. 400.....	217
Brice v. Smith.....	Willes [Eng. C. P.] 1.....	446
Brinkley v. Brinkley.....	50 N. Y. 190.....	323
Brotherson v. Consalus.....	26 How. Pr. 213.....	417
Brown, Matter of.....	21 Wend. 316.....	184
Brown v. Met. Gas L. Co.....	38 How. Pr. 133.....	165
Brown v. Williams.....	7 Cow. 316.....	68
Burbank v. Reed.....	11 N. Y. Weekly Dig. 576.....	333
Burkle v. Luce.....	1 Coms. 164, aff'g., S. G. 6 Hill, 558.....	323
Burrall v. Bushwick R. R. Co.....	75 N. Y. 211.....	198
Butler v. Maynard.....	11 Wend. 548.....	186
Butler's Bail.....	1 Chit. 83.....	226

C.

Cambridge Val. Nat. Bank v.

Lynch	76 N. Y. 514.....	273
Canada Steamship Co. v. Sinclair.....	8 N. Y. Civ. Pro. 285.....	333
Canavan v. McAndrew.....	20 Hun, 46.....	274
Cantrell v. Connor.....	51 How. Pr. 45.....	275
Carleton v. Carleton.....	85 N. Y. 315.....	279
Chadwick v. Spargur.....	1 N. Y. Civ. Pro. 422.....	164, 165
Chaffee v. Baptist Miss. Soc.	10 Paige, 85.....	59, 446
Cheesbrough v. Agate.....	26 Barb. 603.....	10
Childs v. Digby.....	24 Pa. St. 26.....	200
Christmas v. Biddle.....	13 Pa. St. 223.....	200
City Bank v. Bangs.....	4 Paige, 285.....	339
Clarkson v. De Peyster.....	3 Paige, 320.....	188
Colgrove v. Tallman.....	67 N. Y. 99.....	431
Cooley v. Lawrence.....	5 Duer, 610.....	412
Corbett v. De Comeau.....	4 Abb. N. C. 253; S. C., 54 How. Pr. 283.....	37, 39
Corbett v. De Comeau.....	5 Abb. N. C. 169.....	333
Cornell v. Reynolds.....	1 Cow. 241.....	226
Couch v. Mulhane.....	63 How. Pr. 79.....	411
Coughlin v. N. Y. C. & H. R. R. R. Co.	71 N. Y. 443.....	417
Cram v. Cram.....	2 Redf. 224.....	238
Crim v. Cronkhite.....	15 How. Pr. 250.....	313
Croft v. Pawlet.....	2 Strange [Eng. K. B.] 1109..	446
Cudlipp v. Whipple.....	4 Duer, 610.....	121

Cases.	Where Reported.	Page Cited.
Curtis v. Blatchford.....	10 How. Pr. 481.....	339
Cutter v. Pool.....	3 Abb. N. C. 130.....	125

D.

Davies v. The Mayor.....	83 N. Y. 207.....	294
Dayton v. Wilkes.....	17 How. Pr. 510.....	172
Decker v. Decker.....	2 Paige, 149.....	376
De Meerth v. Feldner.....	16 Abb. Pr. 295.....	278
Dittenhoefer v. Lewis.....	5 Daly, 72.....	302
Doe <i>ex dem.</i> Saunders v. Duke of New Castle.....	7 T. R. 332, <i>Notes A</i>	68
Doe <i>ex dem.</i> Webb v. Hull.....	7 T. R. 332, <i>Notes A</i>	68
Donovan v. Vandemark.....	23 Hun, 307.....	27
Douglas v. Haberstro.....	58 How. Pr. 276.....	411
Drake v. Price.....	5 N. Y. 480.....	283
Drummond v. Husson.....	14 N. Y. 60.....	10
Dunlop v. Patterson Fire Ins. Co....	74 N. Y. 147.....	201
Dupuy v. Wurtz.....	47 How. Pr. 225.....	61
Durand v. Lawrence.....	2 Blatch. [U. S. Circ. Ct.] 396.....	116
Durgin v. Ireland.....	14 N. Y. 323.....	417
Dwight v. Germania Life Ins. Co.	84 N. Y. 493.....	68, 241, 243

E.

Elliott v. Swartwout.....	10 Pet. [U. S.] 187.....	120
Elwood v. Western Union Tel. Co.	45 N. Y. 553.....	445

F.

Farmer's Bank v. Empire, etc. Co.	5 Bosw. 275.....	122
Farmers' & Merchants' Bank of Buffalo v. Lang.....	87 N. Y. 214.....	381, 384
Farron v. Sherwood.....	17 N. Y. 227.....	121
Felt v. Tiffany.....	10 Hun, 62.....	302, 304
First National Bank of Meadville v. Fourth Nat'l Bank of N. Y....	84 N. Y. 469.....	27
Fish v. Ferris.....	3 E. D. Smith, 567.....	59
Fisher v. Hepburn.....	48 N. Y. 41.....	212
Fort v. Burch.....	6 Barb. 60.....	135
Foster v. Hawley.....	8 Hun, 68.....	134
Foster v. Pettiborne.....	20 Barb. 350.....	283
French v. Willett.....	10 Abb. Pr. 102.....	122
Frost v. Mott.....	34 N. Y. 252.....	275
Fuller v. Conde.....	47 N. Y. 89.....	312, 314, 316

TABLE OF CASES CITED.

xxiii

G.

Cases.	Where Reported.	Page Cited.
Gerould v. Wilson.....	81 N. Y. 578.....	424, 427, 428
Gibbs v. Queen Ins. Co.....	63 N. Y. 114.....	195, 196
Gilbert v. Moody.....	17 Wend. 357.....	383
Gildersleeve v. Landon....	73 N. Y. 609.....	445
Gillett v. Staples.....	16 Hun, 588.....	187
Glencove Starch Co. v. Gotthold..	1 N. Y. Civ. Pro. 366.....	176
Goodell v. Jackson.....	20 Johns. 697.....	134
Gott v. Cook.....	7 Paige, 523.....	308
Greaves v. Gouge.....	69 N. Y. 154.....	217
Griffin v. Griffin.....	47 N. Y. 137.....	322
Grocers' Bank of N. Y. v. Bayard,	21 Hun, 203.....	274

H.

Hague v. Lucas.....	10 Peters [U. S.] 400.....	383
Hall v. Samson.....	19 Hun, 481.....	384
Hallett v. Hare.....	5 Paige, 315.....	134
Hammond v. Earle.....	5 Abb. N. C. 105.....	249
Hands v. James.....	1 Comyn [Eng. K. B.] 531.....	445, 446
Hartwell v. Bissel.....	17 Johns. 128.....	186
Healy v. Twenty-third St. R. R. Co.	1 N. Y. Civ. Pro. 15.....	81
Herrington v. Robertson.....	71 N. Y. 280.....	81
Higenbotham v. Green.....	25 Hun, 216.....	71
Hosley v. Black.....	28 N. Y. 489.....	121
Howe Machine Co. v. Pettibone..	74 N. Y. 68.....	279
Hull v. Carnley.....	11 N. Y. 501.....	384
Hurst v. Litchfield.....	39 N. Y. 377.....	121
Hurst v. Watkins.....	1 Campb. [Eng. N. P. R.] 69.....	68
Hurtin v. Proal.....	8 Bradf. 414.....	184

J.

Jackson v. Styles.....	3 Wend. 49.....	165
Jessurun v. Mackie.....	24 Hun, 624.....	164
Johnson, <i>In re</i>	2 Curteis [Ecc.] 341.....	447
Jones v. Berwicke.....	L. R. 5 C. P. D. 82.....	243
Jordan v. Poillon.....	77 N. Y. 518.....	391

K.

Kamp v. Kamp.....	59 N. Y. 212.....	209, 212
Kearney McKeen.....	85 N. Y. 136.....	376
Keep v. Keep.....	17 Hun, 152.....	253
Kellinger v. Roe.....	7 Paige, 363.....	59

Cases.	Where Reported.	Page Cited.
Kenney v. Roberts.....	26 Hun, 166.....	333
Kiefer v. Webster.....	6 Hun, 526.....	360, 364
Kinder v. Macy.....	7 Cal. 206.....	243
Kinney v. Roberts & Co.....	26 Hun, 166.....	409
Knapp v. Fowler.....	26 Hun, 202.....	381
Knox v. McDonald.....	25 Hun, 263.....	164

L.

Lafayette Ins. Co. v. French.....	18 How. [59 U. S.] 404....	196, 197
Lamoure v. Caryl.....	4 Denio, 370.....	314
Lansing v. Lansing.....	45 Barb. 182.....	283
Larkin v. Robbins.....	2 Wend. 505.....	253
Leech v. Bates.....	6 Notes of cases [Eng. Ecc. & Mar. Cts.] 699.....	447
Leggett, <i>In re</i>	4 Redf. 149.....	282
Le Roy v. Platt.....	4 Paige, 77.....	187
Lossee v. Ellis.....	18 Hun, 635.....	31
Low v. Durfen.....	5 Fed. Rep. 256.....	3
Luffman, <i>In re</i>	5 Notes of Cases [Eng. Ecc. & Mar. Cts.] 188.....	447
Lyon v. Isen.....	42 How. Pr. 155.....	350

M.

McCabe v. Fogg.....	2 Monthly L. Bull. 7.....	53
McCaffrey v. Hickey.....	66 Barb. 491.....	188
McCluskey v. Cromwell.....	11 N. Y. 593.....	10
McGregor v. McGregor.....	35 N. Y. 218.....	377
McGreight v. Stevens.....	1 H. & E. 454.....	243
McKeer v. Delancy.....	5 Cranch, 22.....	135
McMillan v. Vanderlip.....	12 Johns. 165.....	18
McNair v. Gilbert.....	3 Wend. 346.....	68
McNulty v. Hurd.....	86 N. Y. 547.....	445
Magee v. Vedder.....	6 Barb. 352.....	133
Mallory v. Willis.....	4 N. Y. 76.....	120
Manning v. Keenan.....	73 N. Y. 45.....	333
Manning v. Monaghan.....	28 N. Y. 585.....	364
Manton v. Poole.....	4 Hun, 639.....	356
March v. Davidson.....	9 Paige, 580.....	409
Marsh v. White.....	3 Barb. 518.....	186
Martin v. Windsor Hotel Co.....	10 Hun, 304.....	304
Matteson v. Bloomfield.....	10 Wend. 555.....	314
Meeker v. Crawford.....	5 Redf. 463.....	283
Meeker v. Harris.....	9 Cal. 289.....	243
Merriam v. Hall.....	1 N. Y. Weekly Dig. 60.....	231

TABLE OF CASES CITED.

xxv

Cases.	Where Reported.	Page Cited
Merrick v. Van Santvoord.....	84 N. Y. 208.....	196
Mesick v. Mesick.....	7 Barb. 180.....	376
Mills, <i>Ex parte</i>	10 Wend. 557.....	239
Mills v. N. Y. C. P.....	10 Wend. 557 <i>note</i>	314
Miller v. McCloskey.....	1 N. Y. Civ. Pro. 252.....	249, 482
Mitchell v. Mitchell.....	77 N. Y. 596; aff'g 16 Hun, 97.	445
Moett v. People.....	85 N. Y. 373.....	444, 445
Moffet v. Sackett.....	18 N. Y. 522.....	121
Montague v. Worstell.....	55 How. Pr. 406 and <i>note</i> 525.	329
Moody v. Gleason.....	7 Cow. 482.....	59
Moore v. Genett.....	4 Tenn. Ch. 375.....	200
Morgan v. Morgan.....	1 Abb. Pr. N. S. 40.....	61
Morris v. De Witt.....	5 Wend. 71.....	384
Morris v. Sturges.....	26 How. Pr. 177.....	125
Morris v. Whelan.....	64 How. Pr. 109.....	426

N.

Nat'l. Bank v. Huntington... ..	129 Mass. 444.....	199
Newell v. Cutter.....	19 Hun, 74.....	259
New England Iron Co. v. N. Y. Loan & Imp. Co.....	55 How. Pr. 351.....	125
Newton v. Milleville Man'f. Co... ..	17 Abb. Pr. 318.....	146
N. Y. State Monitor M. Pan Ass'n v. Remington Agr'l Works... ..	89 N. Y. 22.....	146
North v. North.....	1 Barb. Chan. 241.....	322
Norton v. Woodruff.....	2 N. Y. 159.....	120

O.

Orser v. Orser.....	24 N. Y. 52.....	444, 445, 446
Orvis v. Dana.....	1 Abb. N. C. 268.....	68

P.

Parhan v. Moran.....	4 Hun, 717.....	15
Parker v. Moore.....	3 Edw. Chan. 224.....	187
Parshall v. Eggert.....	54 N. Y. 18.....	385
Patterson v. Adams.....	7 Hill, 126.....	440
Peck v. Cook.....	41 Barb. 549.....	278
People v. Bergen.....	53 N. Y. 405.....	210
People v. Carpenter.....	24 N. Y. 86.....	121
People v. Hopson.....	1 Denio, 575.....	186
People v. Ryder.....	12 N. Y. 483.....	121
People v. Walker.....	23 Barb. 305.....	129

Cases.	Where Reported.	Page Cited.
People <i>ex rel.</i> Geer <i>v.</i> Common Council of City of Troy.....	82 N. Y. 575.....	337
People <i>ex rel.</i> Woods <i>v.</i> Crissey.....	91 N. Y. 616.....	434
Philadelphia <i>v.</i> Collector.....	5 Wall [72 U. S.] 720.....	120
Phillip <i>v.</i> Bartlett.....	9 Bosw. 678.....	440
Phoenix <i>v.</i> Dupuey.....	2 Abb. N. C. 146.....	39, 409
Pierson <i>v.</i> Lawrence.....	2 Blatchf. [U. S. Circ. Ct.] 495, 116	
Pitts <i>v.</i> Chambers.....	1 F. & F. 634.....	243
Platt <i>v.</i> Stout.....	14 Abb. Pr. 178.....	121
Pomeroy <i>v.</i> Ricketts.....	27 Hun, 242.....	353, 363
Poppenhuisen <i>v.</i> Seeloy.....	41 Barb. 450; S. C., 3 Keyes, 150. 11	

Q.

Quackenbush <i>v.</i> Leonard.....	10 Paige, 131.....	339
------------------------------------	--------------------	-----

R.

Rawley <i>v.</i> Brown.....	71 N. Y. 89.....	440
Rhoads <i>v.</i> Woods.....	41 Barb. 471.....	185
Riggs <i>v.</i> Cragg.....	89 N. Y. 491.....	132
Robinson's Case.....	8 Abb. Pr. 466.....	275
Roderigas <i>v.</i> East River Savings Institution.....	63 N. Y. 460.....	15
Roderigas <i>v.</i> East River Savings Institution.....	76 N. Y. 316.....	15
Roger <i>v.</i> Hosach.....	18 Wend. 319.....	375
Rose <i>v.</i> Clark.....	8 Paige, 574.....	134
Rutter <i>v.</i> Boyd.....	8 Abb. N. C. 6.....	177

S.

Sanders <i>v.</i> Townshend.....	63 How. Pr. 343; S. C., 11 Abb. N. Y. 217.....	27
Sanford <i>v.</i> Sanford.....	45 N. Y. 723.....	377
Savage <i>v.</i> Gould.....	60 How. Pr. 255.....	61
Savage <i>v.</i> Sherman.....	24 Hun, 307.....	282
Schofield <i>v.</i> Churchill.....	72 N. Y. 565.....	426
Schofield <i>v.</i> Whiteledge.....	49 N. Y. 259.....	440
Schrivver <i>v.</i> Schriver.....	86 N. Y. 580.....	391
Scott <i>v.</i> Myers.....	10 N. Y. Weekly Dig. 531.....	186
Seagram, <i>In re</i>	3 Notes of Cases [Eng. Ecc. & Mar. Cts.] 436.....	446
Sedgwick <i>v.</i> Stanton.....	14 N. Y. 289.....	417
Seguine <i>v.</i> Seguine.....	8 Abb. Pr. N. S. 442.....	61
Seymour <i>v.</i> Newton.....	17 Hun, 32.....	333
Sharpssteen <i>v.</i> Tillon.....	8 Cow. 651.....	136

TABLE OF CASES CITED.

xxvii

Cases.	Where Reported.	Page Cited.
Shaw v. Davis	55 Barb. 389	275
Sheldon v. Allerton	1 Sandf. 700	124
Shipman v. Clark	4 Denio, 446	388
Sisters of Charity v. Kelly	68 N. Y. 628	29, 30
Skinner v. Stuart	39 Barb. 206	186
Smith v. Davis	3 N. Y. Civ. Pro. 74	356, 363, 364
Smith v. Field	105 U. S. 52	119
Smith v. Lawrence	11 Paige, 207	377
Smith v. Mahon	2 N. Y. Civ. Pro. 55	279
Smith v. Slade	57 Barb. 637	275
Southern Navigation Co. v. Sherwin	1 N. Y. Civ. Pro. 46	449
State Tonnage Tax Cases	12 Wall. [79 U. S.] 204	120
Steiger v. Schultz	3 Keyes, 616	43
Stevens v. Phoenix Ins. Co.	41 N. Y. 150	196
Stewart v. Beale	7 Hun, 416 (aff'd. 68 N. Y. 629)	187, 188
Stewart v. Brown	37 N. Y. 350	275
Street v. Smith	7 Watt & S. [Penn.] 447	195
Stockwell v. United States	13 Wall. [80 U. S.] 531	3
Stowell v. Haslett	5 Lans. 382	188
Strong v. Strong	4 Redf. 376	133
Sucar v. N. Y. Central R. R. Co. ..	21 Barb. 245	239
Sutherland v. Carr.	85 N. Y. 105	424

T.

Tanner v. Marsh	53 Barb. 438	304
Taylor v. Delaney	2 Cai. Cas. 743	184, 108
Terry v. Rubel	12 N. Y. Leg. Obs. 137	125
Thompson v. Erie Ry. Co.	9 Abb. Pr. N. S. 233	213
Thompson v. Maxwell	2 Blatchf. (U. S. Circ. Ct.) 385 ..	116
Tilton v. Beecher	59 N. Y. 176	68, 242
Trumbull v. Healy	21 Wend. 670	226
Truscott v. King	6 N. Y. 147	187
Trustees of Auburn Sem. v. Calheun	25 N. Y. 425	447
Tucker v. Tucker	4 Keyes, 136	182, 185

U.

Underhill v. Dennis	9 Paige, 202	59
Union Ins. Co. v. Van Rensselaer ..	4 Paige, 85	308
United States v. Moller	10 Ben. (U. S. Dist. Ct.) 189	4
United States v. Pings	4 Fed. Rep. 714	346

xxviii TABLE OF CASES CITED.

V.

Cases.	Where Reported.	Page Cited.
Vetterlein, <i>In re</i>	18 Blatch. (U. S. Cir. Ct.) 44..	8
Vilmar v. Schall.....	61 N. Y. 564.....	366
Voorhees v. Dorr.....	51 Barb. 580.....	417

W.

Walker v. Granite Bank.....	19 Abb. Pr. 111; S. C., 44 Barb. 177.....	125
Walter v. Fowler.....	85 N. Y. 621.....	326
Ward v. Ford.....	4 Redf. 34.....	283
Ward v. Ingraham.....	1 E. D. Smith, 588.....	229
Ward v. Wiles.....	24 N. Y. 635.....	304
Warts v. Jenkins.....	11 Barb. 546.....	377
Weller v. Weller.....	4 Hun, 196.....	402
West v. West.....	4 S. & T. 22.....	243
Whipple v. Foot.....	2 Johns. 418.....	186
Wigand v. Dejonge.....	18 Hun, 405.....	68
Wilcox v. Hawley.....	81 N. Y. 643.....	275
Willis v. Wiley.....	8 Johns. 268.....	68
Wilson v. Barney.....	5 Hun, 257.....	212
Wilson v. Simpson.....	84 N. Y. 674.....	273
Woodbury v. Sackrider.....	2 Abb. Pr. 402.....	122
Woods v. Pangburn.....	75 N. Y. 495.....	431
Woonsocket Rubber Co. v. Rubber Clothing Co.....	1 N. Y. Civ. Pro. 350.....	366
Wortman v. Wortman.....	17 Abb. Pr. 66.....	278
Wright v. Miller.....	8 Barb. Ct. 382.....	339
Wright v. Rogers.....	L. R. 1 Prob. & Div. 678.....	447

Y.

Yamato Trading Co. v. Brown....	25 Hun, 248.....	332
---------------------------------	------------------	-----

Z.

Zabriskie v. Smith.....	13 N. Y. 322.....	441
-------------------------	-------------------	-----

STATUTES, ETC., CITED.

SECTIONS OF THE CODE OF CIVIL PROCEDURE CITED.

section	Page	Section	Page
2, subd. 6 & 13	80	635	354
3	267, 269	636	320
14, subd. 3 & 15	151	641	195, 327
14	267, 268, 269	647	194, 195, 197, 198, 200
66	51, 52	649	175, 193
110	269	709	151, 157
122	147	713, subd. 1	127
333	327	723	146
421	410, 411, 412	737	2
422	410	755	75
432	196	756	77
433	397	757	75
439	278	772	210
447	485	791, subd. 10	202
448	435, 436	793	202
481	117	814	426
495	368	870	329
500, subd. 1	249	872	329
500	9, 432	881	346, 348
501	267, 268	883	346
519	122	885	215, 216
531	403	886	244
533	122	952	13
546	121	1002	211
549, subd. 4	344, 352	1021	272
549	3, 344	1204	431
557	352	1205	431
558	352	1241	151
580	225	1310	285
581	226	1326	335
599	449	1327	335, 339
620	171	1331	336, 337, 338

xxx

STATUTES, ETC., CITED.

Section	Page	Section	Page
1347	310	2560	60, 62, 63
1365	55	2566	60
1370	307	2589	60, 62, 63
1375	55	2591	16
1391	275	2618	447
1487	344	2672	178
1543	325	2695	13
1559	310	2696	13
1579	310	2697	13
1702	382	2702	16
1703	382	2718	219
1720	439	2739	375
1776	264	2740	375
1780	196	2742	135
1781	239	2743	181, 182, 185
1782	239	2811	282
1868	138	2863, subd. 4	228
2260	163	3017	221
2261	163	3160	105
2262	163	3169	320
2263	163	3228, subd. 3	228
2265	163	3228, subd. 4	30
2266	267, 269	3230	31
2267	260	3251	223
2268	269	3251, subd. 5	223
2269	269	3253	309
2281	269	3256	151
83	269	3268	80, 81, 84
2284	269	3271	81
2366	253	3272	108
2447	259	3307	151, 268
2455	259	3343, subd. 1	80
2456	259	3736	282
43	259		
257	60, 61	Chap. IX., Tit. 3, Art. 1	245
2558	60, 61, 62, 63	“ XV., “ 1	322
2558-2565	60	“ XVII., “ 12, Art. 1	258

xxxv

SECTION	PAGE
180.....	411
236.....	175
385.....	339
388.....	388

Laws of 1817, chap. 58.....	15
“ 1837 “ 460 §§ 33, 37.....	375
“ 1866 “ 115.....	283
“ 1867 “ 460.....	204
“ 1880 “ 245.....	283
“ 1881 “ 581.....	435
“ 1883 “ 405.....	269

2 R. S. p. 68 § 40.....	447	2 R. S. p. 99.....	175
2 R. S. p. 65 §§ 50, 51..	186, 188	2 R. S. p. 143 <i>et seq.</i>	323
2 R. S. p. 88 § 84.....	402	2 R. S. p. 464.....	204
2 R. S. p. 88 §§ 35, 37.....	405	2 R. S. p. 606 § 83.....	389
2 R. S. p. 98 § 71.....	181, 182	2 R. S. p. 701 § 19.....	147

S R. S. p. 262 § 72..... 416

2 R. S. p. 1142 § 11..... 15
8 R. S. p. 448 § 49..... 428

8 R. S. p. 2217 § 6..... 15
8 R. S. p. 2538 § 19..... 147

xxxii STATUTES, ETC., CITED.

GENERAL RULES OF PRACTICE CITED.

Rule 10.....	412
“ 36.....	202
“ 37.....	449
“ 50.....	209

RULES OF COURT OF APPEALS CITED.

Rule 14.....	222
“ 21.....	222

UNITED STATES REVISED STATUTES, CITED.

§ 636.....	8	§ 2864	2
861.....	846	2931.....	115
990.....	8	8011.....	116, 122
991.....	8	8012.....	114, 121
1674 subd. 3.....	15		

OTHER UNITED STATES STATUTES CITED.

12 U. S. Stat. at L. 787.....	2
18 U. S. Stat. at L. 470.....	247
Act of Congress 1863 chap. 76 § 1.....	2

SECTIONS OF CODE OF CIVIL PROCEDURE.

CONSTRUED OR CITED IN THE OPINIONS CONTAINED IN THE FOLLOWING REPORTS, ISSUED DURING THE PERIOD COVERED BY THIS VOLUME: N. Y. Reports, Vols. 91, 92, 93; Demarest's Sur. Reports, Vol. 1; Hun's Reports, Vol. 30; Abbott's New Cases, Vol. 12; Howard's Pr. Reports, Vol. 65; N. Y. Superior Court Reports, Vol. 48; and N. Y. Civil Procedure Reports, Vol. 4.

§ 8 <i>et seq.</i> Doyle v. Doyle	4 N. Y. Civ. Pro. 265.
14 Hall v. U. S. Reflector Co.	4 N. Y. Civ. Pro. 148.
14 Doyle v. Doyle	4 N. Y. Civ. Pro. 265.
14, subd. 3 Schulta v. Anderson	48 Super. Ct. 138.
15 Hall v. U. S. Reflector Co.	4 N. Y. Civ. Pro. 148.
15 Gillies v. Kreuder	1 Dem. 849.
17 Matter of Leffingwell	30 Hun, 528.
66 Albert Palmer Co. v. Van Orden	4 N. Y. Civ. Pro. 44.
66 <i>In re</i> Bailey	4 N. Y. Civ. Pro. 140.
66 Pierson v. Safford	30 Hun, 521.
66 Tullis v. Bushnell	65 How. Pr. 465.
74 Fowler v. Callan	4 N. Y. Civ. Pro. 413.
102 Steffin v. Steffin	4 N. Y. Civ. Pro. 179.
110 <i>et seq.</i> Doyle v. Doyle	4 N. Y. Civ. Pro. 265.
131, 139 Werckman v. Werckman	4 N. Y. Civ. Pro. 146.
190 Victory v. Blood	93 N. Y. 650.
191 Crawford v. W. S. Bank	93 N. Y. 650.
191 Williams v. W. U. Tel. Co.	93 N. Y. 162.
191, subd. 3 American Hosiery Co. v. Reiley ..	12 Abb. N. C. 336.
284 Van Voorhis v. Kelly	65 How. Pr. 300.
295 Gibbon v. Freel	93 N. Y. 93
338 Neely v. McGrandle	4 N. Y. Civ. Pro. 327.
372, subd. 4 Fogg v. Fisk	65 How. Pr. 351.
385 People <i>ex rel.</i> Byrne v. French	12 Abb. N. C. 156.
382, subd. 1 Compton v. Elliott	48 Super. Ct. 213.
382, subd. 5 Knauer v. Globe Mut. Ins. Co. ..	48 Super. Ct. 459.
383 Dickinson v. The Mayor	92 N. Y. 584.
383 Watson v. F. S. S. R. R. Co.	93 N. Y. 522.
383 Watson v. F. S. S. R. R. Co.	48 Super. 44.
386 Compton v. Elliott	48 Super. Ct. 213.
395 De Freest v. Warner	30 Hun, 94.
401 Londrigan v. N. Y. & N. H. R. R. Co. ..	12 Abb. N. C. 273.
402 Greene v. N. Y. Central R. R. Co.	48 Super. Ct. 383.
410 Drake v. Wilkie	30 Hun, 537.

410	Dickinson v. The Mayor.....	93 N. Y. 584.
414	Drake v. Wilkie.....	80 Hun, 587.
414	Matter of Columbian Ins. Co.....	80 Hun, 842.
414	Watson v. F. S. S. R. R. Co.....	48 Super. 44.
414	Watson v. F. S. S. R. R. Co.....	93 N. Y. 522.
414	Greene v. N. Y. Central R. R. Co.....	48 Super. 333.
416	Gibbon v. Freel.....	93 N. Y. 93.
421,	423 Krause v. Averill.....	4 N. Y. Civ. Pro. 410.
424	Pryer v. Clapp.....	1 Dem. 387.
424	Catlin v. Ricketts.....	91 N. Y. 668.
438,	439 Greenbaum v. Dwyer.....	4 N. Y. Civ. Pro. 276.
440	O'Neil v. Bender.....	80 Hun, 204.
446	Danaher v. City of Brooklyn.....	4 N. Y. Civ. Pro. 286.
448	Smith v. Crissey.....	4 N. Y. Civ. Pro. 433.
450	Trebing v. Vetter.....	13 Abb. N. C. 302.
450	Muser v. Miller.....	12 Abb. N. C. 305.
451	Skoog v. Novelty Co.	4 N. Y. Civ. Pro. 144.
451	Town of H. v. 1st Nat. Bank.....	93 N. Y. 82.
452	Matter of Columbian Ins. Co.....	80 Hun, 842.
452	Matter of Dunn.....	1 Dem. 294.
458,	460 Irving v. Garrity.....	4 N. Y. Civ. Pro. 103.
481	Prickhardt v. Robertson.....	4 N. Y. Civ. Pro. 113.
481	Morrison v. Lewis.....	4 N. Y. Civ. Pro. 437.
481,	subd. 3 Dusenbury v. Dusenbury.....	4 N. Y. Civ. Pro. 126.
484	Smith v. Davis.....	4 N. Y. Civ. Pro. 158.
484	Danaher v. City of Brooklyn.....	4 N. Y. Civ. Pro. 286.
484	Pracht v. Ritter.....	48 Super. 509.
488	Smith v. Davis.....	4 N. Y. Civ. Pro. 158.
488	Danaher v. City of Brooklyn	4 N. Y. Civ. Pro. 286.
488	<i>et seq.</i> Beal v. Union Paper Box Co.....	4 N. Y. Civ. Pro. 18.
495	Bell v. Lesbini.....	4 N. Y. Civ. Pro. 367.
500	Sheldon v. Sabin.....	4 N. Y. Civ. Pro. 4.
500	Clark v. Dillon.....	4 N. Y. Civ. Pro. 245.
500	Luce v. Alexander.....	4 N. Y. Civ. Pro. 438.
501	Carpenter v. M. S. Ins. Co.....	93 N. Y. 552.
501	Bell v. Lesbini.....	4 N. Y. Civ. Pro. 367.
519	Prickhardt v. Robertson.....	4 N. Y. Civ. Pro. 112.
521	Ithaca Gas Light v. Treman.....	80 Hun, 212.
531	Stevens v. Webb.....	4 N. Y. Civ. Pro. 64.
531	Train v. Friedman.....	4 N. Y. Civ. Pro. 109.
531	Claffin v. Smith.....	4 N. Y. Civ. Pro. 240.
531	Masterson v. Mayor, &c. N. Y.....	4 N. Y. Civ. Pro. 317.
531	Townsend v. N. Y. Life Ins. Co.....	4 N. Y. Civ. Pro. 398.
532	Springsteene v. Gillette.....	80 Hun, 260.
536	Bradner v. Faulkner.....	93 N. Y. 515.

537	Beal v. Union Paper Box Co.....	4 N. Y. Civ. Pro. 18.
544	Tift v. Bloomberg.....	4 N. Y. Civ. Pro. 349.
544	Dorrance v. Henderson.....	92 N. Y. 406.
545	Hagerty v. Andrews.....	4 N. Y. Civ. Pro. 333.
548	Tompkins v. Smith.....	48 Super. 118.
549	United States v. Reid.....	4 N. Y. Civ. Pro. 1.
549	People v. Phillips.....	30 Hun, 553.
549	subd. 2 Tompkins v. Smith.....	48 Super. 118.
549	subd. 4 Rowe v. Patterson.....	48 Super. 249.
549	subd. 4 Ewart v. Schwartz.....	48 Super. 391.
549	subd. 4 Lawrence v. Foxwell.....	4 N. Y. Civ. Pro. 340, 351.
553	Muser v. Miller.....	12 Abb. N. C. 307.
559	Godfrey v. Pell.....	4 N. Y. Civ. Pro. 448.
580, 581	Lewis v. Stevens.....	4 N. Y. Civ. Pro. 324.
603	Stamm v. Bostwick.....	30 Hun, 70.
620	Pratt v. Underwood.....	4 N. Y. Civ. Pro. 167.
629	Met. Ele. R. R. Co. v. Man. R. R. Co....	65 How. Pr. 377, 319.
629	Williams v. West, U. Tel. Co....	65 How. Pr. 326.
636	Mershon v. Scott Pub. Co.....	4 N. Y. Civ. Pro. 319.
636	Smadbeck v. Sisson.....	4 N. Y. Civ. Pro. 353.
636	Reilly v. Sisson.....	4 N. Y. Civ. Pro. 361.
636	Cribben v. Schillinger.....	30 Hun, 248.
638	Catlin v. Ricketts.....	91 N. Y. 668.
638	Gibbon v. Freel.....	93 N. Y. 98.
640	Sheldon v. Sabin.....	4 N. Y. Civ. Pro. 4.
640	Bate v. McDowell.....	48 Super. 320.
641	Plimpton v. Bigelow.....	4 N. Y. Civ. Pro. 189.
641	Neely v. McGrandle.....	4 N. Y. Civ. Pro. 327.
644	Plimpton v. Bigelow.....	4 N. Y. Civ. Pro. 189.
647	Plimpton v. Bigelow.....	4 N. Y. Civ. Pro. 189.
649	<i>In re</i> Flandrow.....	92 N. Y. 256.
649	Plimpton v. Bigelow.....	4 N. Y. Civ. Pro. 189.
650	Ess v. Toplanyi.....	4 N. Y. Civ. Pro. 173.
650	Almy v. Thurber.....	12 Abb. N. C. 459.
651	Ess v. Toplanyi.....	4 N. Y. Civ. Pro. 173.
682	Sheldon v. Sabin.....	4 N. Y. Civ. Pro. 4.
682	Parsons v. Sprague.....	30 Hun, 19.
682	Tim v. Smith.....	98 N. Y. 57.
683	Parsons v. Sprague.....	30 Hun, 19.
685, 686, 687	Simpson v. St. John.....	93 N. Y. 363.
707, 708	Place v. Riley.....	4 N. Y. Civ. Pro. 393.
709	Hall v. U. S. Reflector Co.....	4 N. Y. Civ. Pro. 143.
709	Bowe v. U. S. Reflector Co.....	4 N. Y. Civ. Pro. 154.
709	Hun v. Salter.....	92 N. Y. 651.
713	Pratt v. Underwood.....	4 N. Y. Civ. Pro. 167.

713, subd. 1	Dusenbury v. Dusenbury.....	4 N. Y. Civ. Pro. 138.
715	Pratt v. Underwood.....	4 N. Y. Civ. Pro. 187.
715	Titus v. Fairchild.....	4 N. Y. Civ. Pro. 413.
723	Skoeg v. Novelty Co.....	4 N. Y. Civ. Pro. 144.
723	Gibbon v. Freel.....	93 N. Y. 93.
726	Gillies v. Kreuder.....	1 Dem. 349.
731	Moffatt v. Henderson.....	48 Super. 449.
737	Davies v. Mayor, &c. N. Y.....	4 N. Y. Civ. Pro. 339.
738	Moffatt v. Henderson.....	48 Super. 449.
740	Noonan v. Smith.....	13 Abb. N. C. 337.
753	Dalton v. Sandland.....	4 N. Y. Civ. Pro. 73.
755-760	Holmes v. St. John.....	48 Super. 307.
756	McNamara v. Harris.....	4 N. Y. Civ. Pro. 72.
757	Dalton v. Sandland.....	4 N. Y. Civ. Pro. 73.
757	Wood v. Flynn.....	30 Hun, 444.
772	In re National Trust Co.....	4 N. Y. Civ. Pro. 303.
783	Gibbon v. Freel.....	93 N. Y. 93.
791	Angle v. Kaufman.....	4 N. Y. Civ. Pro. 301.
791	Bank of A. v. M. N. Bank.....	91 N. Y. 239.
791	Bartlett v. Musliner.....	93 N. Y. 646.
791	People ex rel. v. Kinney.....	93 N. Y. 647.
793	Angle v. Kaufman.....	4 N. Y. Civ. Pro. 301.
793	Bank of A. v. M. N. Bank.....	91 N. Y. 239.
793	Bartlett v. Musliner.....	93 N. Y. 646.
793	People ex rel. v. Kinney.....	93 N. Y. 647.
803	et seq. Dickie v. Austin.....	4 N. Y. Civ. Pro. 138.
812, 813	Trask v. Annett.....	1 Dem. 171.
814	Titus v. Fairchild.....	4 N. Y. Civ. Pro. 413.
818	McKay v. Reed.....	13 Abb. N. C. 38.
828	Greisman v. Dreyfus.....	4 N. Y. Civ. Pro. 32.
828	Matter of Fraser.....	93 N. Y. 239.
839	Steele v. Ward.....	30 Hun, 535.
839	Pease v. Barnett.....	30 Hun, 535.
839	Matter of Fraser.....	93 N. Y. 239.
839	Robbins v. Pultzs.....	48 Super. 510.
839	Scherrer v. Kaufman.....	1 Dem. 39.
839	Whelpley v. Loder.....	1 Dem. 368.
839	Bradley v. Mirrick.....	91 N. Y. 232.
832	People v. McGloin.....	13 Abb. N. C. 173.
832	People v. McGloin.....	91 N. Y. 241.
864	Steele v. Ward.....	30 Hun, 535.
864	Whelpley v. Loder.....	1 Dem. 368.
864	Grattan v. M. L. Ins. Co.....	93 N. Y. 374.
835	Whelpley v. Loder.....	1 Dem. 368.
867	Walker v. Dunleavy.....	4 N. Y. Civ. Pro. 33.

STATUTES, ETC., CITED.

xxxvii

870 <i>et seq.</i>	<i>Greisman v. Dreyfus</i>	4 N. Y. Civ. Pro. 32.
870 <i>et seq.</i>	<i>Walker v. Dunlevey</i>	4 N. Y. Civ. Pro. 33.
870 <i>et seq.</i>	<i>Fogg v. Fisk</i>	4 N. Y. Civ. Pro. 344.
870	<i>Town of H. v. 1st Nat. Bank</i>	93 N. Y. 82.
870	<i>Almy v. Thurber</i>	12 Abb. N. C. 462.
870	<i>Sharp v. Hutchinson</i>	48 Super. 101.
870	<i>Briggs v. Taylor</i>	4 N. Y. Civ. Pro. 328.
870	<i>Andrews v. Keene</i>	4 N. Y. Civ. Pro. 330.
870	<i>Funk v. Tribune Ass'n</i>	4 N. Y. Civ. Pro. 402.
872	<i>Fogg v. Fisk</i>	30 Hun, 61.
872	<i>Hardy v. Peters</i>	30 Hun, 79.
872	<i>Town of H. v. 1st Nat. Bank</i>	93 N. Y. 82.
872	<i>Briggs v. Taylor</i>	4 N. Y. Civ. Pro. 328.
875	<i>Sharp v. Hutchinson</i>	48 Super. 101.
877	<i>Van Roy v. Harriott</i>	30 Hun, 77.
880	<i>Greisman v. Dreyfus</i>	4 N. Y. Civ. Pro. 32.
880	<i>Walker v. Dunlevey</i>	4 N. Y. Civ. Pro. 33.
880	<i>Funk v. Tribune Ass'n</i>	4 N. Y. Civ. Pro. 402.
881	<i>Fogg v. Fisk</i>	4 N. Y. Civ. Pro. 344.
883	<i>Town of H. v. 1st Nat. Bank</i>	93 N. Y. 82.
883	<i>Fogg v. Fisk</i>	4 N. Y. Civ. Pro. 344.
885	<i>Att'y Gen'l v. Cont. Life Ins. Co.</i>	4 N. Y. Civ. Pro. 214.
886	<i>Gustaf v. Am. S. S. Co.</i>	4 N. Y. Civ. Pro. 242.
894	<i>Jones v. Hoyt</i>	48 Super. Ct. 118.
893	<i>Brown v. Landon</i>	4 N. Y. Civ. Pro. 11.
923	<i>Roche v. Marvin</i>	93 N. Y. 393.
934	<i>Lyon v. Lyon</i>	30 Hun, 455.
932	<i>Reese v. Boese</i>	93 N. Y. 632.
997	<i>Ingersoll v. Smith</i>	48 Super. 522.
999	<i>Pollock v. Wannamaker</i>	65 How. 508.
1000	<i>Johnson v. N. Y. O. & W. R. R. Co.</i>	30 Hun, 166.
1002	<i>Post v. Mason</i>	91 N. Y. 539.
1009	<i>Kenney v. Apgar</i>	93 N. Y. 542.
1013	<i>Hall v. Allen</i>	4 N. Y. Civ. Pro. 300.
1013	<i>Stebbins v. Cowles</i>	4 N. Y. Civ. Pro. 302.
1013	<i>O'Reilly v. City of Kingston</i>	30 Hun, 508.
1013	<i>Streat v. Rothchild</i>	12 Abb. N. C. 383.
1018	<i>Knapp v. Fowler</i>	30 Hun, 512.
1021	<i>Thompson v. Schieffelin</i>	4 N. Y. Civ. Pro. 270.
1041	<i>People v. Petros</i>	30 Hun, 98.
1041	<i>People v. Petros</i>	93 N. Y. 128.
1041	<i>People v. Duff</i>	65 How. Pr. 345.
1204, 1205	<i>Luce v. Alexander</i>	4 N. Y. Civ. Pro. 423.
1207	<i>Dusenbury v. Dusenbury</i>	4 N. Y. Civ. Pro. 126.
1207	<i>Murtha v. Carley</i>	12 Abb. N. C. 12.

xxxviii STATUTES, ETC., CITED.

1238, 1239	McCleary v. McCleary.....	30 Hun, 154.
1241	Hall v. U. S. Reflector Co.....	4 N. Y. Civ. Pro. 148.
1241, subds. 2 and 4	Schulte v. Anderson....	48 Super. 133.
1266	Adams v. Bowe.....	12 Abb. N. C. 323.
1268	Seaman v. McReynolds.....	65 How. Pr. 521.
1268	Blumenthal v. Anderson.....	91 N. Y. 171.
1278	Candee v. Smith.....	93 N. Y. 349.
1279	People v. Albany Ins. Co.....	93 N. Y. 458.
1281	People v. Mutual E. & Ac. Ass'n	93 N. Y. 632.
1294	Chase v. Chase.....	65 How. Pr. 306.
1294	Louden v. Loudon.....	65 How. Pr. 41.
1306	McIntyre v. Strong.....	48 Super. 299.
1310	Sudlow v. Pinckney.....	1 Dem. 153.
1310	Morey v. Tracey.....	92 N. Y. 582.
1315	Dow v. Darragh.....	92 N. Y. 537.
1315	Reese v. Boese.....	92 N. Y. 632.
1326	McIntyre v. Strong.....	48 Super. 299.
1319	Estate of Bullard.....	4 N. Y. Civ. Pro. 264.
1327	Grow v. Snell.....	4 N. Y. Civ. Pro. 324.
1331	Grow v. Snell..	4 N. Y. Civ. Pro. 324.
1336	Victory v. Blood.....	93 N. Y. 650.
1337	Hynes v. McDermott.....	91 N. Y. 452.
1347	<i>In re</i> Nat'l. Trust Co.....	4 N. Y. Civ. Pro. 308.
1349, 1350	Victory v. Blood.....	93 N. Y. 650.
1365	Cupfer v. Frank.....	4. N. Y. Civ. Pro. 53.
1365	Disosway v. Hayward.....	1 Dem. 175.
1369	Disosway v. Hayward.....	1 Dem. 175.
1370	Place v. Riley.....	4 N. Y. Civ. Pro. 336.
1375	Cupfer v. Frank.....	4 N. Y. Civ. Pro. 53.
1381	Wadley v. Davis.....	30 Hun, 570.
1381, subd. 2	Gillies v. Kreuder.....	1 Dem. 349.
1391	Keiher v. Shipherd.....	4 N. Y. Civ. Pro. 274.
1391	Russell v. Dean.....	30 Hun, 242.
1405	Steffin v. Steffin.....	4 N. Y. Civ. Pro. 179.
1487	United States v. Reid.....	4 N. Y. Civ. Pro. 1.
1501	Smith v. Long.....	12 Abb. N. C. 112.
1501	Chamberlain v. Taylor.....	12 Abb. N. C. 473. 92 N. Y. 348.
1504	Horton v. N. Y. C. R. R. Co.....	12 Abb. N. C. 30.
1510	Horton v. N. Y. C. R. R. Co.....	12 Abb. N. C. 30.
1531	Pierson v. Safford.....	30 Hun, 581.
1533	Hughes v. Hughes.....	30 Hun, 349.
1533	Scheu v. Lehning.....	4 N. Y. Civ. Pro. 335.
1543	Hagerty v. Andrews.....	4 N. Y. Civ. Pro. 323.
1638	Stamm v. Bostwick.....	30 Hun, 70.

STATUTES, ETC., CITED.

xxxix

1670	Brainard v. White.....	12 Abb. N. C. 407. 48 Super. 899.
1694	<i>et seq.</i> Bank of Oswego v. Dun....	4 N. Y. Civ. Pro. 878.
1730	Morrison v. Lewis.....	4 N. Y. Civ. Pro. 487.
1737	Bowes v. U. S. Reflector Co.....	4 N. Y. Civ. Pro. 154.
1739	Bowes v. U. S. Reflector Co.....	4 N. Y. Civ. Pro. 154.
1766	Ramsden v. Ramsden.....	91 N. Y. 281.
1769	Lee v. Lee.....	4 N. Y. Civ. Pro. 321.
1769	Chase v. Chase.....	65 How. Pr. 808.
1769	Louden v. Louden.....	65 How. Pr. 411.
1770	Spahn v. Spahn.....	12 Abb. N. C. 169.
1776	Bengtson v. Thingvalla S. S. Co.....	4 N. Y. Civ. Pro. 260.
1776	C. A. & A. Ass'n v. Read.....	93 N. Y. 474.
1778	Hutson v. Morrisania S. Co.....	12 Abb. 278.
1781	Beecher v. Schieffelin.....	4 N. Y. Civ. Pro. 280.
1781	Paulsen v. Van Steenbergh.....	65 How. Pr. 342.
1782	Beecher v. Schieffelin.....	4 N. Y. Civ. Pro. 280.
1782	Paulsen v. Van Steenbergh.....	65 How. Pr. 342.
1807	Att'y Gen'l v. N. A. L. Ins. Co.....	93 N. Y. 887.
1819	Drake v. Wilkie.....	30 Hun, 587.
1825	Hanselt v. Gano.....	1 Dem. 36.
1832, 1833, 1834	Thorne v. Underhill.....	1 Dem. 306.
1836	Meltzer v. Doll.....	91 N. Y. 865.
1861	Hatch v. Sigman.....	1 Dem. 519.
1865	Hatch v. Sigman.....	1 Dem. 519.
1902	Londrigan v. N. Y. & N. H. R. R. Co.	12 Abb. N. C. 278.
1913	Baldwin v. Roberts.....	30 Hun, 168.
1926	Bridges v. Board of Supervisors.....	92 N. Y. 570.
1937	Morey v. Tracey.....	92 N. Y. 581.
1953	People <i>as rel.</i> Swinburne v. Nolan.....	30 Hun, 484.
2007	Matter of Leary.....	30 Hun, 394.
2070	People <i>as rel.</i> Sanderson v. Board of Can- vassers of Greene.....	12 Abb. N. C. 101.
2129	Matter of Leary.....	30 Hun, 394.
2140	People <i>as rel.</i> Drevet v. Fire Coms.....	30 Hun, 376.
2140	People <i>as rel.</i> Murphy v. French.....	92 N. Y. 806.
2222	Matter of White.....	12 Abb. N. C. 348.
2228	Lahrs v. Commors.....	30 Hun, 468.
2260	Broadwell v. Holcombe.....	4 N. Y. Civ. Pro. 159.
2262	Broadwell v. Holcombe.....	4 N. Y. Civ. Pro. 159.
2265	Broadwell v. Holcombe.....	4 N. Y. Civ. Pro. 159.
2265	Matter of White.....	12 Abb. N. C. 348.
2265	Cutter v. Cutter.....	48 Super. 470.
2266	McNulty v. Scolley.....	4 N. Y. Civ. Pro. 200.
2266	Cutter v. Cutter.....	48 Super. 470.

2369	Cutter v. Cutter.....	48 Super. 470.
2435	Cromwell v. Spoffard.....	4 N. Y. Civ. Pro. 273.
2436	Mankin v. Pape.....	65 How. Pr. 453.
2441	Davis v. Herrig.....	65 How. Pr. 290.
2446	Albright v. Kempton.....	4 N. Y. Civ. Pro. 16.
2451	Hancock v. Sears.....	4 N. Y. Civ. Pro. 255.
2456	Davis v. Herrig.....	65 How. Pr. 290.
2460	Dusenbury v. Dusenbury.....	48 Super. 205.
2463	Hancock v. Sears.....	4 N. Y. Civ. Pro. 255.
2472	Brittin v. Phillips.....	1 Dem. 57.
2473	Guion v. Underhill.....	1 Dem. 302.
2472, subd. 8	Thompson v. Mott.....	1 Dem. 52.
2473	Matter of Verplanck.....	91 N. Y. 439.
2476	Matter of Langbein.....	1 Dem. 448.
2476	Duffy v. Smith.....	1 Dem. 209.
2481	Matter of Verplanck.....	91 N. Y. 439.
2481, subds. 5, 11	Guion v. Underhill.....	1 Dem. 302.
2481, subd. 6	Melcher v. Stevens.....	1 Dem. 123.
2481, subd. 6	Pryer v. Clapp.....	1 Dem. 387.
2485	Gillies v. Kreuder.....	1 Dem. 349.
2496	People v. Welent.....	30 Hun, 475.
2514, subd. 11	Stapler v. Hoffman.....	1 Dem. 63.
2517	Pryer v. Clapp.....	1 Dem. 387.
2520	Boerum v. Betts.....	1 Dem. 471.
2527	Estate of Hewitt.....	4 N. Y. Civ. Pro. 57.
2538	Gillies v. Kreuder.....	1 Dem. 349.
2545	Mills v. Hoffman.....	92 N. Y. 181.
2546	Matter of Leffingwell.....	30 Hun, 523.
2552	Gillies v. Kreuder.....	1 Dem. 349.
2553, 2554	Disosway v. Hayward.....	1 Dem. 175.
2554, 2555	Matter of Disosway.....	91 N. Y. 235.
2555, subd. 4	Ferguson v. Cummings.....	1 Dem. 433.
2556	Stokes v. Dale.....	1 Dem. 261.
2557 <i>et seq.</i>	Estate of Hewitt.....	4 N. Y. Civ. Pro. 57.
2557 <i>et seq.</i>	Matter of Sexton.....	1 Dem. 3.
2558	Forster v. Kane.....	1 Dem. 67.
2558, subd. 3	Bertine v. Hubbell.....	1 Dem. 335.
2558, subd. 3	Whelpley v. Loder.....	1 Dem. 368.
2561	Forster v. Kane.....	1 Dem. 67.
2561	Matter of Brown.....	65 How. Pr. 461.
2561	Gillies v. Kreuder.....	1 Dem. 349.
2561	Walton v. Howard.....	1 Dem. 103.
2561	Hall v. Campbell.....	1 Dem. 415.
2562	Matter of Brown.....	65 How. Pr. 461.
2562	Walton v. Howard.....	1 Dem. 103.

2562	Hall v. Campbell.....	1 Dem.	415.
2566	Estate of Hewitt.....	4 N. Y. Civ. Pro.	57.
2573	Matter of Dunn.....	1 Dem.	294.
2577	Sudlow v. Pinckney.....	1 Dem.	158.
2577	<i>et seq.</i> Du Bois v. Brown.....	1 Dem.	317.
2591	Brown v. Landon.....	4 N. Y. Civ. Pro.	11.
2602	Thompson v. Mott.....	1 Dem.	32.
2602	Guion v. Underhill.....	1 Dem.	303.
2602	Hassey v. Keller.....	1 Dem.	577.
2606	Le Count v. Le Count.....	1 Dem.	39.
2607, 2608	Scotfield v. Adriance.....	1 Dem.	193.
2611	Estate of Bogert.....	4 N. Y. Civ. Pro.	441.
2617	Stapler v. Hoffman.....	1 Dem.	63.
2617	Carpenter v. Historical Society.....	1 Dem.	606.
2618	Estate of Bogert.....	4 N. Y. Civ. Pro.	441.
2621	Hatch v. Sigman.....	1 Dem.	519.
2623	Estate of Bogert.....	4 N. Y. Civ. Pro.	441.
2623	Hyatt v. Lunnin.....	1 Dem.	14.
2624	Matter of Hagenmeyer's Will.....	12 Abb. N. C.	433.
2624	McClure v. Woolley.....	1 Dem.	574.
2628	Hovey v. McLean.....	1 Dem.	396.
2638, subd. 1	Ballard v. Charlesworth.....	1 Dem.	501.
2643, subd. 4	Fowler v. Walter.....	1 Dem.	249.
2644	Batchelor v. Batchelor.....	1 Dem.	309.
2647	Pryer v. Clapp.....	1 Dem.	387.
2650	Bray v. Smith.....	1 Dem.	163.
2667	Matter of Malloy.....	1 Dem.	421.
2668	Cornwell v. Cornwell.....	1 Dem.	1.
2668	Tooker v. Bell.....	1 Dem.	52.
2672	Estate of Fricke.....	4 N. Y. Civ. Pro.	177.
2672	Stokes v. Dals.....	1 Dem.	260.
2685	Drexell v. Berney.....	1 Dem.	163.
2685	Hassey v. Keller.....	1 Dem.	577.
2695	Moyer v. Well.....	1 Dem.	71.
2695, 2696, 2697	Brown v. Landon.....	4 N. Y. Civ. Pro.	11.
2702	Brown v. Landon.....	4 N. Y. Civ. Pro.	11.
2706	Metropolitan Trust Co. v. Rogers.....	1 Dem.	265.
2710	Metropolitan Trust Co. v. Rogers.....	1 Dem.	265.
2717	Estate of McKiernan.....	4 N. Y. Civ. Pro.	218.
2717	Mumford v. Coddington.....	1 Dem.	27.
2717	Thompson v. Mott.....	1 Dem.	32.
2717	Smith v. Murray.....	1 Dem.	84.
2717	Fiester v. Shepard.....	92 N. Y.	251.
2718	Fiester v. Shepard.....	92 N. Y.	251.
2718	Estate of McKiernan.....	4 N. Y. Civ. Pro.	218.

2718	Thompson v. Mott.....	1	Dem.	83.
2718	Smith v. Murray.....	1	Dem.	84.
2718	Mumford v. Coddington.....	1	Dem.	27.
2719	Hoyt v. Jackson.....	1	Dem.	553.
2726	Edwards v. Edwards.....	1	Dem.	133.
2731	Greene v. Day.....	1	Dem.	45.
2734	Tickel v. Quinn.....	1	Dem.	425.
2736	Estate of Slosson.....	4	N. Y. Civ. Pro.	280.
2736	Hall v. Campbell.....	1	Dem.	415.
2737	Arthur v. Nelson.....	1	Dem.	387.
2739	Fraenznick v. Miller.....	1	Dem.	186.
2739	Snyder v. Snyder.....	4	N. Y. Civ. Pro.	370.
2739	Moyer v. Weil.....	1	Dem.	71.
2739	Bauer v. Kastner.....	1	Dem.	136.
2740	Snyder v. Snyder.....	4	N. Y. Civ. Pro.	370.
2741	Thorne v. Underhill.....	1	Dem.	306.
2743	Estate of Orser.....	4	N. Y. Civ. Pro.	139.
2743	Matter of Verplanck.....	91	N. Y.	439.
2743	Greene v. Day.....	1	Dem.	45.
2743	Giles v. De Talleyrand.....	1	Dem.	97.
2743	Fraenznick v. Miller.....	1	Dem.	186.
2743	Du Bois v. Brown.....	1	Dem.	317.
2752	Dennis v. Jones.....	1	Dem.	80.
2752	Kammerrer v. Ziegler.....	1	Dem.	177.
2754,	2755 Kammerrer v. Ziegler.....	1	Dem.	177.
2756,	2757 Matter of Fox.....	92	N. Y.	93.
2759,	subd. 4 Dennis v. Jones.....	1	Dem.	80.
2811	Estate of Slosson.....	4	N. Y. Civ. Pro.	280.
2811	Hall v. Campbell... ..	1	Dem.	415.
2823	Ledwith v. Ledwith.....	1	Dem.	154.
2826	Ledwith v. Ledwith.....	1	Dem.	154.
2830	Rieck v. Fish.....	1	Dem.	75.
2851	Matter of Schroeder.....	65	How. Pr.	194.
2863,	subd. 4 Steele v. MacDonald.....	4	N. Y. Civ. Pro.	227.
2863,	subd. 4 Bundick v. Hale.....	4	N. Y. Civ. Pro.	311.
2870	McNeary v. Chase.....	30	Hun,	491.
2893	Fowler v. Haynes	91	N. Y.	346.
2901,	2902 McNeary v. Chase.....	30	Hun,	491.
2951,	2952 Matter of White	12	Abb. N. C.	343.
2957	Fox v. E. P. Co.....	93	N. Y.	54.
3017	Cunningham v. Eiseman.....	4	N. Y. Civ. Pro.	330.
3017	Baldwin v. Roberts.....	30	Hun,	163.
3139	Merston v. Scott Pub. Co.....	4	N. Y. Civ. Pro.	319.
3160	Stephenson v. Hanson.....	4	N. Y. Civ. Pro.	104.

STATUTES, ETC., CITED.

xliii

3165	Gibbon v. Freel.....	93 N. Y. 93.
3215	The Mayor v. Decker.....	65 How. Pr. 472.
3223	Langdon v. Guy.....	91 N. Y. 661.
3228,	subd. 3 Steele v. MacDonald.....	4 N. Y. Civ. Pro. 327.
3228,	subd. 3 Bundick v. Hale.....	4 N. Y. Civ. Pro. 311.
3228,	subd. 4 Newcomb v. Hale.....	4 N. Y. Civ. Pro. 25.
3228	Greene v. Village Canandaigua.....	306 Hun, 306.
3228	Murtha v. Curley.....	92 N. Y. 359.
3229	Smith v. Cooper.....	30 Hun, 395.
3230	Newcomb v. Hale.....	4 N. Y. Civ. Pro. 25.
3234	Cooper v. Jolly.....	30 Hun, 324.
3238	Murtha v. Curley.....	92 N. Y. 359
3240	People ex rel. Bray v. Supervisors of Ulster.....	65 How. Pr. 327.
3246	Tolman v. S. B. & N. Y. R. R. Co.....	92 N. Y. 353.
3251,	subd. 5 Malcolm v. Hamill.....	4 N. Y. Civ. Pro. 221.
3253	Weed v. Paine.....	4 N. Y. Civ. Pro. 305.
3253	Paine v. Genesee Valley Canal R. R. Co.....	30 Hun, 565.
3253	Barclay v. Culver.....	4 N. Y. Civ. Pro. 365.
3253	Conaughty v. S. C. Bank.....	92 N. Y. 401.
3254	Weed v. Paine.....	4 N. Y. Civ. Pro. 305.
3256	Hall v. U. S. Reflector Co.....	4 N. Y. Civ. Pro. 148.
3256	Matter of Leary.....	30 Hun, 394.
3258	Smith v. Cooper.....	30 Hun, 395.
3263	McNamara v. Harris.....	4 N. Y. Civ. Pro. 76.
3263	Ryan v. Potter.....	4 N. Y. Civ. Pro. 80.
3263	Stephenson v. Hanson.....	4 N. Y. Civ. Pro. 104.
3263	Irving v. Garrity.....	4 N. Y. Civ. Pro. 105.
3263	Hayes v. Second Ave. R. R. Co.....	4 N. Y. Civ. Pro. 84.
3263,	subd. 1 Bostwick v. Fifield.....	4 N. Y. Civ. Pro. 79.
3269	Stephenson v. Hanson.....	4 N. Y. Civ. Pro. 104
3271	Tolman v. S. B. & N. Y. R. R. Co.....	92 N. Y. 353.
3271	Ryan v. Potter.....	4 N. Y. Civ. Pro. 80.
3272	McCall v. Frith.....	4 N. Y. Civ. Pro. 102.
3272	Hoffman v. Lowell.....	4 N. Y. Civ. Pro. 103.
3277	Hoffman v. Ridley.....	4 N. Y. Civ. Pro. 41.
3301	Dow v. Darragh.....	92 N. Y. 537.
3307	Hall v. U. S. Reflector Co.....	4 N. Y. Civ. Pro. 148.
3307	Doyle v. Doyle....	4 N. Y. Civ. Pro. 265
3341	Dickinson v. The Mayor.....	92 N. Y. 584.
3343,	subd. 1 Bostwick v. Fifield.....	4 N. Y. Civ. Pro. 79.
3347	Mills v. Hoffman.....	92 N. Y. 181.
3347	People ex rel. Murphy v. French.....	92 N. Y. 306.
3347	McKay v. Read....	12 Abb. N. C. 58.

8347	Matter of Discoway.....	91	N. Y. 235.
8347	Matter of Weston.....	91	N. Y. 502.
8347, subd. 11	Matter of Sexton.....	1	Dem. 3.
8352	Matter of Sexton.....	1	Dem. 3.
8356	Matter of Schroeder....	65	How. Pr. 194.

CIVIL PROCEDURE REPORTS.

UNITED STATES v. JAMES REID.

U. S. CIRCUIT COURT, SOUTHERN DISTRICT OF NEW
YORK, APRIL, 1883

§§ 549, 1487.

Execution.—Properly issued out of U. S. Circuit Court on judgment recovered in U. S. District Court, and affirmed, on writ of error, in the Circuit Court.—Value of goods forfeited for false entry, when recovered, not a penalty.—Contract, in action on which defendant may be arrested under section 549 of the Code, must be between party and party, and not that general contract between members of society to support the laws implied from living under them.

Where a judgment recovered in the U. S. district court was affirmed in the U. S. circuit court on a writ of error brought by the defendant, *Held*, that an execution was properly issued out of the circuit court for the damages and the costs of both courts,[¹] that when the judgment of the district court was affirmed in the circuit court, it did not remain the judgment of the district court to be enforced by its process, but it became the judgment of the circuit court.[¹]

Where the United States recovered a judgment for the value of certain merchandise forfeited for entry by false and fraudulent practices and appliances, pursuant to section 1, chapter 76, Act of 1863, *Held*, that the issuing of an execution to collect the judgment was governed by the laws of this state;[²] that an execution against the body of the defendant could not issue on said judgment; that the value of the goods forfeited, when recovered, was not a penalty,

 United States v. Reid.

the object of the government being not to prevent imports, but to collect its revenue, and the statute which worked the forfeiture being remedial to that end.['] Also *Held*, that the action was not on contract either express or implied.[']

The contract in an action upon which section 549 of the Code of Civil Procedure provides that the defendant may be arrested, is a contract between party and party, and not that general compact between members of society and all others, to support the laws, implied from living under them.[']

State v. Molter (10 *Ben. U. S. Dist. Ct.* 189), approved.[']
[*Decided August 2, 1883.*]

Motion by defendant to correct judgment record, and set aside execution against the person.

The facts are stated in the opinion.

Edwin B. Smith, for motion.

Elihu Root, opposed.

WHEELER, J.—This was an action of debt for the value of merchandise forfeited for entry by means of false and fraudulent practice and appliances, under section 1, of chapter 76, act of 1863 (12 *U. S. Stat. at L.* 737; *U. S. Rev. Stat.* § 2864).

The plaintiff recovered judgment in the district court at March term, 1873. On writ of error brought by the defendants, the judgment was affirmed in this court at April term, 1879. An execution against the bodies of the defendants has been issued out of this court for the damages and costs of both courts. The defendant has moved to have the judgment of this court made to be for costs in this court only, and to set aside the execution because it runs against the bodies of the defendants.

The judgment of this court appears to have been entirely correct. When the judgment of the district court was affirmed in this court, the judgment did not remain in the district court as the judg-

United States v. Reid.

ment of that court to be enforced by its process, but because the judgment of this court (*U. S. Rev. Stat.* § 636). If this was not so, and the form of entering the judgment was clerically wrong, proceedings to correct the record should be taken before the justice who decided the entry. This part of the motion must be denied. Whether the execution could properly ['] issue in such a case is to be determined by the laws of the State. *U. S. Rev. Stat.* §§ 990, 991; *Low v. Durfee*, 5 *Fed. Rep.* 256.

The law of the State directly applicable is found in the Code of Civil Procedure, section 549. That section allows process to issue against the body in actions:

"1. To recover a fine or penalty. . . .

"4. In an action upon contract, express or implied, other than a promise to marry; where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability," and in no other cases claimed to be applicable.

The object of the government is not to prevent imports, but to collect its revenue. The statutes which work this forfeiture are remedial to that ['] end. This is the mode of obtaining the duties when the goods are so proceeded with as to become forfeited. The value of the goods forfeited, when recovered, is no more a penalty than the duties would be if paid. *Stockwell v. United States*, 13 *Wall.* (80 *U. S.*) 531; *In re Vetterlein*, 13 *Blatch.* (*U. S. Cir. Ct.*) 44. The execution cannot be upheld on the ground that the recovery was a penalty.

As to the other ground, this can hardly be ['] said to be an action upon contract, either express or implied. Certainly there was no express contract. By force of the law, the property ceased to be the property of the defendants, and became the property of the government, if the government should choose to take it, and the government became entitled

 Sheldon v. Sabin.

to the value of it in lieu of the property, and not by virtue of any contract. The action of debt could be maintained, because of the title or right created by the law, and not by virtue of any obligation to pay entered into by the defendants, or to be implied from their acts beyond what rests upon everybody to obey the law and to yield to all its requirements. The liability to be incurred within the meaning of this part of the Code is a liability upon contract between [.] party and party, and not the general compact between each member of society, and all the others to support the laws implied from living under them. These views were well supported by the reasoning of CHOATE, J., in *United States v. Moller*, 10 Ben. (U. S. District Court) 189.

Motion to set aside execution granted.

SHELDON, AS RECEIVER, ETC., RESPONDENT, v.
SABIN, IMPEADED, ETC., APPELLANT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM,
JANUARY, 1883.

§§ 500, 640, 682.

Pleading.—Instance of an insufficient denial in an answer.—Where attachment vacated in part only, the sureties, on the undertaking to procure it, do not become liable for damages, and this, although it was sustained in part because a portion of the property attached had been sold under execution in the same action.

Where, in an action on an undertaking given upon the issuing of an attachment, the answer admitted the making of the undertaking, and stated that "as to all the other allegations this defendant denies the same either upon his own knowledge, or as not having any knowledge or information thereof sufficient to form a belief in

Sheldon v. Sabin.

respect to the same." *Held*, that the answer was not within the requirements of the rule that an answer must contain a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;[¹] also *Held*, where the answer was verified, that it has been the policy of the law to prescribe a form of verification which would prove the conscience of the party, and in this case the denials may be placed either upon knowledge, a want of knowledge, or information, as may suit the conscience of the party making the oath, or provide a defense upon an indictment for perjury.[²]

Where an action in the marine court was fully tried at trial term, and the complaint dismissed after the jury had found a verdict for plaintiff, and the case was considered upon the whole record by the general term of that court, and the judgment of the trial term reversed, and judgment ordered on the verdict for the plaintiff. *Held*, that an appeal to the court of common pleas from the judgment of said general term, should not be decided upon an exception to the sufficiency of the answer, because affirming the judgment on that single question would deprive the defendant of the right to ask leave to amend, which he might have exercised, had not the decision at the trial term been in his favor and upheld his answer.[³]

Where an order denying a motion to vacate an attachment was not reversed upon appeal, but was modified so as to deny the motion so far as it related to the property actually sold under an execution issued in the action in which the attachment was issued, and to grant the motion and vacate the attachment as to property not sold under execution. *Held*, in an action on the undertaking given on obtaining such attachment, that to determine whether the attachment was vacated the order alone should be examined;[⁴] that the fact that the attachment was upheld in part, and the motion to vacate partially denied because an execution had rendered the attachment *functus officio*, did not avoid the fact that the writ was not, in terms, vacated;[⁵] that the defendant, being a surety, his liability should not be extended, but was *strictissima jura*.[⁶]

(Decided March 15, 1883.)

Appeal from a judgment of the general term of the N. Y. marine court reversing a judgment entered at trial term, by direction of the court, after verdict dismissing the complaint, and directing judgment to be entered in favor of the plaintiff upon the verdict.

Sheldon v. Sabin.

The action was brought by plaintiff, as receiver of the firm of A. H. Mojarrietta & Co., to recover against the defendants, as sureties on an undertaking given to procure an attachment in a suit brought in the supreme court, by Victor W. McFarlane against the members of the firm of A. H. Mojarrietta & Co., on the ground that they had disposed of their property with intent to defraud their creditors. The undertaking was in the usual form, conditioned "that if the defendant recover judgment in this [the attachment] action, or if the warrant of attachment is vacated, the plaintiff will pay," etc.

A warrant of attachment was thereupon issued in that action, directing the sheriff to seize property enough to satisfy the claim of McFarlane for \$4934.69, and it appears that the sheriff did levy upon sufficient property to cover that amount. A portion of the property so levied upon, to wit: office furniture worth \$250.00, was sold by the sheriff under an execution in the same suit. Afterward, a motion was made to vacate the attachment, on the papers on which it was granted, which was denied. On appeal to the general term it was ordered, "that the order denying the motion to vacate said warrant of attachment be modified so as to deny the said motion so far as it relates to the property actually sold on execution, and granting the same, and vacating said warrant of attachment as to property not sold on execution, without costs to either party, of appeal or motion."

The opinion of the general term, (DAVIS, P. J., BRADY and INGALLS, JJ.), was as follows:

"**PER CURIAM.**—We are of the opinion that the assignment executed by the defendants in this case, was not sufficient, *per se*, to establish the fraudulent intent, and that the motion to vacate the attachment should, therefore, have been granted. But inasmuch

Sheldon v. Sabin.

as some portion of the attached property has been sold under execution, the attachment cannot be vacated absolutely, but only so far as it relates to any property remaining unsold.

"The order should be modified by denying the motion, so far as it relates to the property sold under execution, and granting the same as to the property not sold, no costs to either party on appeal or motion."

In the case at bar, the answer after admitting the making of the undertaking sued upon, continued, "and as to all the other allegations in said complaint, this defendant denies the same, either upon his own knowledge, or as not having any knowledge or information thereof sufficient to form a belief in respect to the same." The plaintiff, at the opening of the case, moved for judgment in favor of the plaintiff upon the pleadings, on the grounds (1) "that the answer contained no denial of any material allegation in the complaint, or any denial upon knowledge or information sufficient to form a belief as to any material allegation stated in the complaint; (2) that the answer sets up no new affirmative defense; (3) that it is disjunctive; (4) that the denial is not good, because it is too general in its terms." This motion was denied, and the plaintiff excepted.

The defendant moved at the close of plaintiffs' case, and upon the whole case, to dismiss the complaint. The court reserved its decision, and a verdict was rendered for the plaintiff, subject to the decision of said motion. The motion was subsequently granted, and the complaint dismissed, and judgment entered thereon in favor of the defendants. On appeal, the general term of the marine court reversed this judgment, and directed judgment to be entered for the plaintiff upon the verdict. From the judgment so entered, this appeal was taken.

Sheldon v. Sabin.

Thomas Nelson and E. P. Johnson, for appellant.

Cited in support of contention that the attachment was not vacated so as to make the defendant liable, *McCluskey v. Cromwell*, 11 *N. Y.* 593; *Drummond v. Husson*, 14 *N. Y.* 60; *Cheesbrough v. Agate*, 26 *Barb.* 603; *Poppenhusen v. Seeley*, 41 *Id.* 450; *S. C. aff'd*, 3 *Keyes* 150, 3 *Abb. Ct. App. Dec.* 615; *Royal Ins. Co. v. Noble*, 5 *Abb. N. S.* 58; *Wood v. Fisk*, 63 *N. Y.* 245; *Palmer v. Foley*, 71 *N. Y.* 106.

The argument that where the result to the defendant is substantially the same as if the terms of the undertaking had been literally complied with, he is entitled to a construction giving him the same remedy, is unsound, and unsupported in the courts. *Johnson v. Elwood*, 82 *N. Y.* 363. . . . The order of the court is what embodies its decision and alone settles what is to be reviewed. . . . The opinion of the judge is not only not proper evidence in the case, but should be disregarded when in any way conflicting with the order. *Smith v. Rathbun*, 88 *N. Y.* 660. . . . The disposition of the case made at the trial, in taking the verdict subject to the decision of the court upon the motion to dismiss, was proper. *Hall v. Hall*, 81 *N. Y.* 131. The denials in the answer were sufficient, and the plaintiff's motion for judgment on the pleadings was properly denied. . . . The answer contained "a general denial of each material allegation of the complaint controverted." *Code*, § 500. That such denial is proper, see *Haines v. Herrick*, 9 *Abb. N. C.* 379; *Allis v. Leonard*, 22 *Alb. L. J.* 28; *Jones v. Ludlum*, 74 *N. Y.* 62. . . . If the denial is inartistic, or not as formal as it might be, or indefinite, the proper remedy was by motion before trial. *Dauchy v. Tyler*, 15 *How. Pr.* 400; *Youngs v. Kent*, 46 *N. Y.* 672; *Marie v. Garrison*, 83 *Id.* 23. A fatal objection to the plaintiff's motion existed in the fact that the plaintiff waived all objections to the mode of pleading, by noticing the cause

Sheldon v. Sabin.

for trial by which he accepted the issues as they stood. *Kellogg v. Baker*, 15 *Abb. Pr.* 289.

James L. Bishop, for respondent.

The attachment was wholly vacated. . . . A warrant of attachment cannot be vacated in part. *Royal Ins. Co. v. Noble*, 5 *Abb. Pr. N. S.* 54. . . . In *White v. Clay's Executors*, 7 *Leigh (Va.)* 68, where the undertaking was to pay "in case the injunction should be dissolved," the court held the sureties liable, although the injunction was dissolved only in part. See also *Page v. Johnson*, 1 *Chapman (Vt.)* 338. . . . *Seacord v. Morgan*, 4 *Abb. Ct. App. Dec.* 172. . . . *Gilmore v. Crowell*, 67 *Barb.* 62.

BEACH, J.—An answer must contain "a general or specific denial of each material allegation of the ['] complaint controverted by the defendant or of any knowledge or information thereof sufficient to form a belief." *Code of Civil Procedure*, § 500. The denial in this answer is not within the requirement of this rule. It is impossible to distinguish the allegations denied upon knowledge from those denied from a want of knowledge, or information sufficient to form a belief. The plaintiff would be entitled to a relief if the answer denied from want of knowledge or information, facts stated in the complaint, necessarily within the defendant's knowledge. This would be avoided if this form of pleading was permitted.

Again, this is a verified answer, and the policy of the law has been to prescribe a form of verification, which will prove the conscience of the party. In this instance, the defendant swears that the answer is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. The denials may be placed either upon knowl-

Sheldon v. Sabin.

edge, a want of knowledge or information, as may suit the conscience of the party making the oath, or provide a defense upon an indictment for perjury.

The action was fully tried at the trial term and the case considered upon the whole record by the general term of the marine court, making a like course ['] here eminently proper. It would be impossible to decide the appeal upon an exception to the sufficiency of the answer, because affirming the judgment on that single question would deprive the defendant of the right to ask leave to amend, which he might have exercised had not the decision at the trial term been in his favor and upheld his answer. The motion to vacate the attachment was denied at special term. The apparent, but not needful provision, in the order of the general term of the supreme court, gives rise to the contention whether or not the attachment was there vacated. To answer the ['] inquiry, the order must alone be examined, and without enlarging its terms, because the defendant here impleaded being a surety, his liability should not be extended, but is (*McCluskey v. Cromwell*, 11 *N. Y.* 593) *strictissimi juris*.

The special term denied the motion to vacate the writ. Upon an appeal, the order was not reversed, ['] and the attachment vacated, but was modified "to deny the said motion so far as it relates to the property actually sold on the execution, and granting the same and vacating said warrant of attachment as to property not sold on execution." The effect and action of the process was partially upheld by this order, as was part of the special term order denying the motion to vacate. Though this was because an execution had rendered the attachment useless, or *functus officio*, it does not avoid the fact of the writ not having been vacated in terms (*Drummond v. Husson*, 14 *N. Y.* 60; *Cheesbrough v.*

Brown v. Landon.

Agate, 26 Barb. 603; Poppenhusen v. Seeley, 41 Barb. 450; S. C., 3 Keyes, 150).

The judgment of the general term should be reversed and a new trial ordered, with costs to appellants to abide the event.

DALY, Ch. J., and VAN BRUNT, J., concurred.

BROWN, AS ADMINISTRATOR, ETC., RESPONDENT, v.
LANDON, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT; GENERAL
TERM, MAY, 1883.

§§ 952, 2591, 2695, 2696, 2697, 2702.

Ancillary letters of administration.—Proof required on issuing.—Such letters not void, nor to be disregarded in collateral proceeding, because proof on which they were granted was defective or irregular, if surrogate acquired jurisdiction.—Power of attorney to receive ancillary letters of administration properly acknowledged before Vice-Consul of United States.

Where a petition for the issuing of ancillary letters of administration was in proper form and included the statements required to sustain the application, but the papers in support of it were irregular and insufficiently authenticated, and the petition was granted upon this irregular and deficient proof,—*Held*, that the surrogate's action being upon a subject-matter confided to his jurisdiction, his determination and decree upon it could not be disregarded collaterally because of these defects,^[1] and that although it was clear that upon appeal from his determination it would be reversed, it did not follow from that circumstance that it was void;^[2] that the acceptance of the defective proof was an error which could not be corrected otherwise than by an appeal from the surrogate's order or decree.^[1]

Where ancillary letters of administration were issued upon proof

Brown v. Landon.

tending to establish the right to them, although it was defective and irregular, they became conclusive in favor of the right of the administrator therein named to maintain an action on a note belonging to the deceased.[*,*]

In support of an application for the issuing of ancillary letters testamentary, or of administration on a will proved in a foreign country, the Code requires an exemplified copy of the will and of the letters issued upon its probate, together with the judgment or decree admitting it to probate.[1] Where a certificate of the register of a foreign probate court was added to what was alleged to be a copy of the will, and to a statement of the action taken upon the application for its probate, and these were authenticated simply and solely by the certificate of the Vice and Deputy Consul General of United States in London, who also certified himself to be a notary public of the United States,—*Held*, that this was not such an authentication of the documents as the statute (Code of Civil Procedure, § 952) directed should be made to authorize the papers themselves, to be read in evidence.[2]

Where a power of attorney signed by an administrator appointed by a foreign probate court, and a son of the deceased who had been nominated to act as executor, authorizing a person to make application for and receive letters of administration in this state, was acknowledged before a vice-consul of the United States in such foreign country,—*Held*, that the acknowledgment was properly taken before such an officer, and could be legally received in evidence in support of an application for ancillary letters of administration.[3]

(Decided June 2, 1888.)

Appeal by defendant from a judgment entered against him, on the verdict of a jury, and from an order denying a motion for a new trial.

The opinion states the facts.

John E. Parsons (Gilbert & Cameron, attorneys),
for appellant.

Erwin I. Spink (Culver & Wright, attorneys), for
respondent.

DANIELS, J.—The recovery was for the amount due upon three promissory notes made by the defendant,

Brown v. Landon.

and payable to the order of James Landon, the defendant. No point has been made questioning the liability of the defendant upon the notes, and as that fact appears by the evidence to have been reasonably well established on the trial, it will not be taken under consideration in the disposition of the appeal.

Before the commencement of the action the plaintiff, upon his own petition, had been appointed by the surrogate of the county of New York the administrator of so much of the goods, chattels and credits of the decedent as were left by him in this state at the time of his decree. And it is the legality of that appointment which has been drawn in question on the argument of this appeal.

The decedent died in London, in England, where it was alleged, in support of the application, he left a will making a disposition of his estate. And the application for the plaintiff's appointment resulting in the order made by the surrogate, was made under the authority of the provisions of the code which authorized the issuing of ancillary letters testamentary and of administration (*Code Civ. Pro.* §§ 2695, 2696 and 2697).

The petition for the letters was in proper form and included the statements required to sustain the application. But the papers produced in support of it were irregular and insufficiently authenticated. For this purpose the law* required an exemplified copy of the will and of the foreign letters issued upon its ['] probate, together with the judgment or decree admitting it to probate, and by section 952 of the Code of Civil Procedure, the manner in which these documents were to be authenticated was prescribed by the Legislature, but there was a failure to comply with these provisions of the Code. A certificate of the registrar of the probate court was added to what was

* Code Civ. Pro. § 2695.

Brown v. Landon.

alleged to be a copy of the will and to hardly an intelligible statement of the action taken upon the application for its probate, and these certificates were authenticated simply and solely by the certificates of the vice and deputy consul general of the United States in London, who also certified himself to be a notary public of the United States. But that was ['] not such an authentication of the documents as the statute upon this subject, in very plain language, directed should be made to authorize the papers themselves to be read in evidence.

The surrogate, however, acted upon this proof, irregular and deficient as it clearly was. But his action was upon a subject matter confined to his jurisdiction, and his determination and decree upon it cannot be disregarded collaterally because of these defects in the proceedings. It is clear that upon an appeal the determination would be reversed. But it does not follow from that circumstance that it ['] was void. The subject matter to which the proof was directed was clearly within the jurisdiction of the surrogate, and that was to grant ancillary letters testamentary or of administration upon the estate of the deceased party, and he did have evidence before him tending to establish the facts upon which his authority was by law required to be exercised, and as he exercised his judgment upon that proof ['] and made his determination directing the issue of the letters, it cannot be disregarded in this action simply because he erroneously allowed this defective and irregular proof to be given. To avoid that result it was sufficient that the proof had a legal tendency to establish the facts required to be shown, and that it should have been rejected because of the manner of its authentication will not invalidate his decree to such an extent as to allow it to be held void when brought collaterally in controversy, as it was upon the trial of

Brown v. Landon.

this action. This subject was very fully considered in *Roderigas v. East River Savings Institution* (63 *N. Y.* 460), and in *Roderigas v. Same* (76 *Id.* 316), where it was held that proof tending to establish the right of the applicant to redress, although it may be substantially defective, is sufficient to sustain such letters against the objection taken to them in this case.

The power of attorney from the administratrix appointed in the foreign proceedings, and from the son of the decedent who was nominated as one of ['] his executors, the others having probably declined to act, was also produced in support of the plaintiff's application. This was in like manner proved by the certificate of the same vice consul, but the acknowledgement of this document could properly be taken before such an officer (2 *R. S.* 6th ed. 1142, § 11),* for while he acted he was entitled to exercise the authority vested by law in the consul himself (*U. S. Rev. Stat.* § 1674, sub. 3).

This instrument was accordingly in such a condition as allowed it to be legally received as evidence so far as it extended in support of the application, and by that the plaintiff was authorized to make the application to the surrogate and to receive the letters which were issued by him, and as these letters ['] were issued upon proof tending to establish the right to them, although it was defective and irregular, they became conclusive in favor of the plaintiff's right to maintain this action (*Parhan v. Moran*, 4 *Hun*, 717).

And this is the effect which the Code has prescribed that letters testamentary, letters of administration and letters of guardianship shall have when they may be granted by a court or officer having jurisdiction to issue them (Code of Civil Procedure,

* 3 *R. S.* 7 ed. 2217, § 6 ; *Laws of 1817*, chap. 58.

Albright v. Kempton.

§ 2591), and this provision is rendered applicable to letters of this description by section 2702.

For these reasons the defendant cannot successfully resist the right of the plaintiff to maintain this action for the recovery of the amount due upon the notes. The acceptance by the surrogate of the defective proof, as long as it tended to establish the facts required ['] to support the application, was an error only, which could be no otherwise corrected than by an appeal from his order or decree.

The law will not allow his erroneous action to be set aside in this manner. The judgment should therefore be affirmed.

DAVIS, P. J., and BRADY, J., concurred.

ALBRIGHT v. KEMPTON.

CITY COURT OF NEW YORK, SPECIAL TERM, JULY,
1883.

§ 2446.

Supplementary proceedings.—Money owing to the debtor, but not due and payable at the time an order in, was served, cannot be reached.—

Court has no power to make decree appropriating a debtor's future earnings to the payment of a judgment.

Where an order for the examination of a judgment debtor was obtained July 5, and his salary became due and payable July 10, and certain commission earned by him would not be due and payable until the end of the year,—*Held*, that this money not being due and payable at the time the order was served, could not be reached in such proceedings.

The court has no power to make an equitable decree appropriating any part of the debtor's future earnings to the payment of a judg-

Albright v. Kempton.

ment against him. Such earnings cannot be anticipated, and can be reached, if at all, only after they are payable.
(Decided July 18, 1888.)

Motion that the Dudley Blind & Shutter Worker & Burglar Alarm Company pay to the sheriff certain salary due the defendant, to be applied on account of the judgment against him.

The plaintiff recovered a judgment in this court against the defendant, for \$148.91, on which he issued an execution to the sheriff of the city and county of New York, which was returned wholly unsatisfied. Subsequently, on July 5, 1883, an order was obtained for the examination of the defendant, in proceedings supplementary to execution. On his examination thereunder, it appeared that the defendant was employed as manager of the Dudley Blind & Shutter Worker & Burglar Alarm Company, a domestic corporation; that he received for his services as such manager, a salary of \$1,500 per annum, payable in monthly installments of \$125, about the 10th of each month, and three per cent. commission on the proceeds of all sales made by the company until the commission amounted to \$150; that his July salary had not yet been paid, and the commission earned by him amounted to about \$30. On an affidavit setting forth these facts, the plaintiff moved for an order that the Dudley Blind & Shutter Worker & Burglar Alarm Company pay the salary of defendant for July, and his commissions to the sheriff to be applied in payment of the judgment. On the motion, the defendant showed that on July 10 intermediate his examination and the service of the papers on which this motion was made, his salary for July had been paid him, and that his commissions were not payable until the end of the year.

De Lancey Nicoll, for motion.

Beal v. Union Paper Box Co.

William B. Tullis, opposed.

McADAM, J.—The order for examination was obtained July 5, 1883, and the salary of the judgment debtor was not due and payable until July 10, and the commissions will not be due until the end of the year. This money not being due and payable at the time the order herein was served, cannot be reached in this proceeding (1 *Weekly Dig.* 260 ;* 12 *Johns.* 165†). Nor has the court power to make an equitable decree appropriating any part of the debtor's future earnings to the payment of this judgment. Such earnings cannot be anticipated, and can be reached, if at all, only after they are payable. These views render it unnecessary to consider the question whether the earnings of the debtor are, in this case, exempt by force of the provisions of the Code.

Motion denied ; no costs.

BEAL v. THE UNION PAPER BOX COMPANY
OF NEW YORK.

N. Y. SUPERIOR COURT, SPECIAL TERM, AUGUST, 1883.

§§ 488 *et seq.*, 537.

Frivolous pleading.—At least five days' notice of motion for judgment thereon must be given.—Court cannot shorten such time.—New affidavits cannot be used on such a motion.—Instances of demurrer which was not frivolous.

Full five days' notice must be given of a motion for judgment on a demurrer as frivolous. An order to show cause returnable in less

* Merriam v. Hill.

† McMillan v. Vanderlip.

Beal v. Union Paper Box Co.

than that time is improper, even though cause for a shorter time is shown in the moving papers.

The use of affidavits on a motion for judgment on a demurrer on the ground that it is frivolous, tending to show that the demurrer is interposed for delay, or tending to show that it is frivolous or in bad faith is not allowable. The only question on such a motion is whether the demurrer on its face, when considered in connection with the complaint alone, is in bad faith or frivolous.

The complaint set forth that a certain certificate of stock of defendant's was issued to one who indorsed thereon a power of attorney signed in blank; that subsequently, said certificate was sold at public auction and purchased by one in his own name, but who was in reality acting as the agent of plaintiff; that plaintiff thereafter made demand upon defendant for a transfer on its books, and a new, or other certificate to plaintiff, presenting the certificate in question with the power of attorney filled in with the name of D., and an assignment of the stock from D. to plaintiff, and that defendant refused to comply with any of these demands, ending with a demand for judgment that defendant be required to make the transfer and issue a new certificate to plaintiff. Defendant demurred on the ground that plaintiff had not the legal capacity to sue, in that D., and not plaintiff, was the real party in intent, and the further ground that the complaint did not state facts sufficient to institute a cause of action,—*Held*, that the complaint was defective, and a motion for judgment on the demurrer as frivolous, must be denied. (*Decided August 29, 1883.*)

Motion for judgment on a demurrer to the complaint on the ground that the demurrer was frivolous.

Plaintiff obtained on August 27, 1883, an order to show cause, returnable in two days, why he should not have judgment on the demurrer to the complaint, as frivolous. The application was based on affidavits tending to show that defendant had examined the plaintiff before trial, and obtained numerous extensions for the purpose of delay, and had declared its intention to hinder and delay plaintiff so far as lay within its power, and had interposed a demurrer for that purpose, and for that reason asked an order to show cause returnable in less than five days.

Beal v. Union Paper Box Co.

The complaint was as follows :

"The plaintiff, William H. Beal, by Van Duzer and Taylor, his attorneys, complains of the above defendant, Union Paper Box Co. of N. Y., and alleges :

"First. That said defendant is a domestic corporation, created by and under the laws of the state of New York.

"Second. That said defendant, on or about the 17th day of October, 1881, duly issued a certificate of stock under seal of said corporation ; that said certificate was numbered 23 (twenty-three) of the certificates of said corporation, and was for 100 (one hundred) shares of its capital stock of the par value of \$100 (one hundred dollars) each, was dated the 17th day of October, 1881, was issued for value and was delivered to Charles Howard Williams, and that in and by the terms of said certificate of stock, so issued as aforesaid, it was and is provided that the said stock was and is transferable on the books of said corporation, defendant, upon the surrender of said certificate.

"Third. That heretofore and prior to the transactions hereinafter mentioned, said Charles Howard Williams signed and sealed an assignment and power of attorney, and indorsed the same upon said certificate of stock, in which assignment and power of attorney the date and name of the assignee and attorney were not inserted, but in which blank spaces were left for such date and name.

"Fourth. That upon the 28th day of July, 1882, said shares of stock were offered for sale at public auction in the city of New York, and purchased at such sale by James H. Dederick, for the sum of one thousand dollars, he being the highest bidder therefor, and that said certificate of stock was then and there delivered to said James H. Dederick, who thereupon wrote in his name as assignee and attorney in the

Beal v. Union Paper Box Co.

blank therefor in said assignment indorsed on said certificate.

"Fifth. That said James H. Dederick bid in and purchased said stock as aforesaid in his own name, but that in fact he acted as the agent of and made said purchase for the benefit of this plaintiff, William H. Beal, and upon the 26th day of April, 1883, signed, sealed and delivered to this plaintiff an assignment of said certificate, and of the shares of stock described therein, and an acknowledgment of said agency, and that this plaintiff has been, since the said purchase of said stock by said Dederick, the owner and holder of said certificate and of the several shares of stock therein described.

"Sixth. That after said assignment by said Dederick to this plaintiff, and prior to the commencement of this action, and on the 30th day of April, 1883, this plaintiff duly presented said certificate of stock, together with the two transfers and assignments, and said acknowledgment of the agency, before described, to the defendant, at its proper place of business in New York city, and to the proper offices of said defendant, to wit: To the president, and to the secretary and treasurer of said defendant corporation, and then and there offered to surrender said certificate of stock and assignment thereof to said corporation, and demanded of said defendant and its officers the transfers of said stock upon the books of said corporation to this plaintiff, and also demanded that the defendant should issue such new or other certificate of the capital stock of said corporation to this plaintiff in the place and stead of the certificate of stock so offered to be surrendered.

"Seventh. That the defendant, by its officers, upon the demand before stated in the sixth subdivision of this complaint, did absolutely refuse to transfer the said stock to this plaintiff upon the books of the said

Beal v. Union Paper Box Co.

defendant, and did refuse to allow the same to be so transferred upon said books, and did refuse to issue to this plaintiff a new or other certificate of the capital stock of the said corporation in the place and stead of the said certificate of stock then held as aforesaid by this plaintiff, and then and there offered to be surrendered, and the said defendant did then and there refuse to recognize this plaintiff as the owner and holder of this stock.

"Eighth. That the whole number of shares of the capital stock of said corporation is 3,000 (three thousand) of the par value of \$100 (one hundred dollars) each for each share. The entire capital of said corporation being \$300,000 (three hundred thousand dollars), and that the par value of the stock so held by this plaintiff is \$10,000 (ten thousand dollars).

"Wherefore, plaintiff demands judgment.

"(1) That the defendant by the decree of this court be directed upon the surrender of said certificate, and the assignment thereof and said acknowledgment of agency, to transfer said stock upon the books of said defendant to this plaintiff.

"(2) That the defendant also issue to this plaintiff a new certificate of the like amount of shares of its capital stock as is mentioned in the certificate now held by said plaintiff.

"(3) That the plaintiff recover the costs of this action, and have such further and other relief as to the court may seem proper and just."

The grounds of demurrer were:

"I. That plaintiff has not the legal capacity to sue in that James H. Dederick is the real party in interest.

"II. That it does not state facts sufficient to constitute a cause of action."

Thomas Fenton Taylor, for the motion.

I. Section 780 of the Code prescribes that all notices

Beal v. Union Paper Box Co.

of motion, where special provision is not otherwise made by law, shall be at least eight days, unless the court by order to show cause prescribes a shorter time. The provision of section 537, requiring notice of five days, is one of the cases intended by the phrase "where special provision is not otherwise made by law." The provision of section 780 allowing an order to show cause where shorter time is necessary, therefore, applies alike to section 537 as to section 780.

II. The use of affidavits on the motion is proper, and it is necessary to show the grounds for shorter notice than five days.

III. The demurrer is interposed for delay, the real intention doubtless being to amend by substituting an answer, and by this means obtain twenty days' further time. Defendant's attorney declared his intention to give plaintiff's attorney all the trouble professionally in this case that he could devise. There have been numerous extensions and an examination of plaintiff, all to what end? Even though the demurrer was good as to plaintiff's not being the real party in interest, it is bad as to the complaint's not stating sufficient facts to constitute a cause of action, and it is well settled that if it is bad in part, it must fall altogether.

Frederick K. Clark (*Charles Howard Williams*, attorney), opposed.

I. Section 537 of the Code requires that notice of this motion shall be not less than five days, and wherever in the Code it is intended that a shorter notice may be given, it is plainly stated in the same or subsequent section; as for instance, § 780 requires that an ordinary notice of motion shall be eight days, but a clause immediately follows in the same section, providing that for cause shown, an order to show same may issue returnable in less than eight days. Section 537

Beal v. Union Paper Box Co.

contains no such qualification, and the express mention of it in section 780 excludes it in all sections wherein provision is not made.

II. The plaintiff has no right to use affidavits, nor urge extrinsic matters on this motion. The sole question before the court on this motion, is whether the demurrer on its face is "so clearly and palpably bad as to require an argument or illustration to show its character, and which would be pronounced frivolous, and indicative of bad faith in the pleader upon bare inspection." *Strong v. Sproul*, 53 *N. Y.* 497.

III. On the merits, the complaint, in showing that Dederick having purchased in his own name, and executed only an assignment to plaintiff, and not a power of attorney shows the title to be still in Dederick, and therefore the plaintiff is not entitled to sue; and the failure to show title from or through Williams is an omission of a fact material to constitute a cause of action.

SEDGWICK, J.—[Orally.]—I think the objection taken by Mr. Clark as to the length of notice, and use of affidavits, well taken. The question before me is solely whether the demurrer on its face is frivolous,* and I cannot entertain any consideration of extraneous matters. The complaint seems defective in not showing the manner of plaintiff's obtaining title to the stock. It merely alleges that he purchased it at public auction. I shall therefore deny the motion with \$10 costs, to abide event.

The order entered read as follows :

* In *Cook v. Warren*, 88 *N. Y.* 37, it was held that to justify an order overruling a demurrer as frivolous, it must not only be without adequate reason, but so clearly and plainly without foundation, that the defect appears upon mere inspection, and indicates that it was interposed in bad faith. See to same effect, *Strong v. Sproul*, 53 *N. Y.* 497; *Vilas Nat'l Bank v. Moore*, 14 *Weekly Dig.* 334.

Newcomb v. Hale.

"Ordered, That said motion be denied with ten dollars costs to abide event, on the ground that notice of motion was less than five days, and on the merits."

**NEWCOMB, AS RECEIVER OF THE ATLANTIC MUTUAL
LIFE INSURANCE COMPANY v. HALE.**

**SUPREME COURT, THIRD DEPARTMENT, ALBANY
COUNTY SPECIAL TERM, DECEMBER, 1882.**

§§ 3228, subd. 4, 3230.

Costs.—When the court of appeals reversed a judgment "with costs to abide the event," the party eventually successful recovers costs for all steps in the action.—Where a judgment was modified, and as modified affirmed "with costs to the appellant," "with costs" meant costs in the court of appeals only.—The costs of an action for the foreclosure of a mortgage, wherein judgment for deficiency is awarded against a guarantor of the payment of the mortgage, are in the discretion of the court.

It is well settled that when the court of appeals reverses a judgment "with costs to abide the event," that the party who eventually succeeds, recovers costs for all the different steps in the action.[¹]

Where the court of appeals, on appeal from the general term of the supreme court, ordered that the judgment in an action for the foreclosure of a mortgage be reversed and modified by inserting a provision adjudging the defendant liable for any deficiency, and as so modified, affirmed with costs to the appellant,—*Held*, that "with costs" meant costs in the court of appeals only; [¹,²] that if the judgment or order affirmed gave costs, the successful party would obtain costs in the lower court by virtue of the original judgment or order which was affirmed, but if the order or judgment appealed from and sustained gave no costs, the party succeeding on the appeal would not recover costs in the lower court.[²]

Where, in an action to foreclose a mortgage on real property, it was

Newcomb v. Hale.

adjudged that the plaintiff have judgment for the deficiency, if any, arising on the sale of the mortgaged premises, against one H., who had guaranteed the payment of the mortgage,—*Held*, that the plaintiff was not entitled to costs, of course against the defendant, H., under subdivision 4 of section 8228 of the Code of Civil Procedure which provides that a “plaintiff is entitled to costs of course, upon the rendering of a final judgment in his favor,” in an action “in which the complaint demands judgment for a sum of money only;”[³] that while as against the defendant, H., the relief sought might result in a judgment for money only, the relief demanded in the complaint was not a judgment for a sum of money only;[⁴] that the costs were in the discretion of the court as provided by section 8230 of the Code.[⁴]

Sisters of Charity v. Kelly (68 N. Y. 628), followed and explained.[⁴]

Motion under section 3265 of the Code of Civil Procedure for a new taxation of costs.

The facts are stated in the opinion.

De Witt Roosa, for the motion.

N. C. Moak, opposed.

WESTBROOK, J.—The defendant, Matthew Hale, had assigned a mortgage to The Atlantic Mutual Life Insurance Company, with a guarantee of payment.

The plaintiff, as the receiver of the insurance company, commenced an action to foreclose the mortgage, making Hale a party defendant. Hale defended upon the ground that his guarantee of payment was discharged by the neglect of the company to foreclose, as he requested it to do. His defense was sustained at circuit and general term, but overruled in the court of appeals, which court (to use the exact language of the remittitur) “did order and adjudge that the judgment of the general term of the supreme court appealed from as relates to defendant Hale, be and the same is hereby reversed and modified by inserting a pro-

Newcomb v. Hale.

['] vision adjudging the defendants liable for any deficiency, and, as so modified, affirmed with costs to the appellant."

After the decision of the court of appeals, the plaintiff procured his costs to be taxed by the clerk of the county of Albany, who against the objection of the defendant Hale, allowed to the plaintiff costs and disbursements in the supreme court, to the amount of \$158.15. The present motion presents the property of that allowance.

It is well settled, that when the court of appeals reverses a judgment "with costs to abide the ['] event," that the party who eventually succeeds, recovers costs for all the different steps in the cause (*First National Bank of Meadville v. Fourth National Bank of New York*, 84 *N. Y.* 469; *Donovan v. Vandemark*, 22 *Hun.* 307; *Sanders v. Townshend*, 63 *How. Pr.* 343*).

The reason of this is apparent. The costs in the court of appeals are by the order made to depend upon the final event, and when the final judgment awards to the prevailing party costs of the action, he recovers those in the court of appeals by force of its order, which gave to the lower tribunal express power to award them; and those for the proceedings had in such lower tribunal, because its judgment giving them was within its statutory authority over costs for steps taken in an action whilst within its jurisdiction and under its control.

The reasons, however, upon which the cases referred to depend—that the lower tribunal can award costs for proceedings in the court of appeals, whenever such latter court authorizes it so to do, and that the former has the original power to award costs in an action for such proceedings therein, as were had before it—so far from sustaining the allowance to the plaintiff of the

* S. C., 11 *Abb. N. C.* 217.

Newcomb v. Hale.

costs in this action, while it was pending in this court, are opposed to such allowance. Certainly this court has not, either at general or special term, ordered judgment for the plaintiff against the defendant Hale, with costs of the action, and if the taxation of the clerk of Albany county is to be sustained, it can only be upheld by showing that the judgment of the court of appeals awards them. Has it is done so? Its order does not direct, as the counsel for the plaintiff argued, the judgment of the general term to be reversed and modified "by inserting a provision adjudging the defendant Hale liable for any deficiency," with costs of the action. If it did, then it could be plausibly and perhaps successfully said, that as the roll so amended provided for a judgment against Mr. Hale, with costs, the plaintiff should recover costs of the action. The amendment which the order directs to be made to the judgment, does not, however, direct that the judgment against the defendant shall be with costs. On the contrary, the only amendment to be made to the judgment of the general term is, that it shall declare "Hale liable for any deficiency;" and then the order further provides, that the judgment "as so modified," to wit, a judgment against Hale for any deficiency, without any declaration or provision as to the costs, "is affirmed with costs to the appellant."

The question, therefore, which this case presents is, when a judgment by the general term is modified so as to provide for a recovery against the defendant in a certain contingency, and no costs are adjudged against the defendant as a part of such recovery, and such judgment "as so modified," is "affirmed with costs to appellant," what costs are recoverable?

In other words, suppose in an action in which costs are in the discretion of the court (and that this is such an action will presently be shown) a judgment is rendered in the supreme court, without any provision for

Newcomb v. Hale.

costs, and that on appeal to the court of appeals, such judgment is affirmed with costs, what costs are recoverable?

Such a question would seem to admit of only one answer, and that is, an affirmance in the court of appeals of a judgment or order, with costs, means costs in ['] the court of appeals only. If the judgment or order affirmed gave costs, the successful party would obtain costs in the lower court by virtue of the original judgment or order which was affirmed; but if the order or judgment appealed from and sustained, gave no costs, the party succeeding on the appeal would not recover costs in the lower courts. Precisely such a case this motion presents. The judgment of the lower court is modified so as to render a judgment in favor of the plaintiff, but without costs, and, as so modified, is affirmed with costs to the appellant.

This provision clearly gives only costs in the court of appeals, and no other.

It is argued, however, that the judgment of the court of appeals reversed the judgment of the lower court, and that costs in the lower court follow.

That may be so in a case in which costs are a part of the recovery as matter of right. This is not such a case, as will presently be shown, but the right to recover costs in the supreme court, as the supreme court has not awarded any, depends entirely upon the judgment of the court of appeals. The attempt has been made by an analysis of the language of the remittitur, to show that no costs in this court have been given. It is useless, however, to argue, as the court of appeals has construed the meaning of language similar to that contained in the order in this case. In *Sisters of Charity v. Kelly*, ['] (68 N. Y. 628), it was held, "When costs are given by the judgment of this court, *it means costs in this court* to the successful party, as against the unsuc-

Newcomb v. Hale.

cessful party." The report of the case is not full, but inquiry of counsel has developed the following facts: A will offered for probate had been rejected on the ground of defective execution. The supreme court at general term reversed the decree of the surrogate, and the decision of the court of appeals was: "Judgment of the general term reversed, and decree of surrogate affirmed with costs." In holding, then, in *Sisters of Charity v. Kelly*, that an order reversing the general term, and affirming a surrogate's decree "with costs" only gave costs in the court of appeals, that tribunal has so construed words similar to those used in this case, as to render impossible the construction claimed for them by the plaintiff in this action.* It was also urged on the part of the plaintiff, that he is entitled to recover costs in the supreme court by subdivision 4 of section

3228 of the Code of Civil Procedure, which entitles [] the plaintiff "to costs of course, upon the rendering of a final judgment in his favor" in an action "in which the complaint demands judgment for a sum of money only." The present case was not one of that character. As against the defendant Hale, the relief sought, if any was given, might result in a judgment for money only; but the relief demanded by the complaint was not a "judgment for a sum of money only." On the contrary, the action was for a foreclosure of a mortgage, and a sale of the mortgage premises, as the primary and principal relief; and as the secondary and

* In *Murtha v. Curley* (3 *N. Y. Civ. Pro.* 266, reversing *Id.* 86) the court of appeals held, that where it reversed an order of the general term, directing a new trial, and affirmed the judgment of the special term with costs, "with costs" meant all the taxable costs subsequent to the judgment affirmed consequent upon the appeals both to the general term and to the court of appeals. See also, *In re Protestant Episcopal School*, 86 *N. Y.* 397; *Post v. Doremus*, 60 *Id.* 372; *Rust v. Hauselt*, 46 *Super. (J. & S.)* 38.

Newcomb v. Hale.

final relief, the complaint asked for a personal judgment against Hale for any deficiency arising upon the sale.

The same relief was asked against Hale, that is generally asked against the obligors of a bond which ordinarily accompanies a mortgage, and in the present action, no more than in one brought to foreclose a mortgage, to which the obligors executing the bonds accompanying it are made parties for the purpose of making them liable for any deficiency upon the sale, can it be truly said, that the sole relief demanded by the complaint is a money judgment.

The position of the plaintiff is not maintainable; the costs are recoverable by him in this case, as, of course, under the section of the Code referred to. On the contrary, as has been shown, that section does not apply, and section 3230, which places costs in the ['] discretion of the court, does. It is true that if the plaintiff had sued Mr. Hale directly upon his covenant, he would have been entitled to his costs, as of right. He did not, however, do so, but, on the contrary, he brought an action to foreclose a mortgage, making him a party to it, and it has been expressly decided (*Lossee v. Ellis*, 13 *Hun*, 635) that "in an action to foreclose a mortgage, the costs are in the discretion of the court." See also *Herrington v. Robertson*, 71 *N. Y.* 280, 284.

The conclusions from the foregoing reasoning are clear. First, the plaintiff was not entitled to recover costs in the supreme court, as of course. Second, the supreme court, neither at general or special term, has awarded them. Third, the court of appeals has awarded costs only in that tribunal; and, Fourth, as costs have never been allowed for the proceedings in this court, the allowance of them to the plaintiff by the clerk was erroneous.

The motion of the defendant is therefore granted,

 Greismann v. Dreyfus.

but as the question is somewhat novel, and the plaintiff has succeeded in the action, no costs are allowed thereon.

GREISMANN, AS ADMINISTRATRIX, ETC., v.
DREYFUS, ET AL.

CITY COURT OF BROOKLYN, SPECIAL TERM,
AUGUST, 1883.

§§ 828, 870 *et seq.*, 880.

Examination of party before trial.—The fact that questions may be put on such an examination which will tend to criminate the witness, affords no justification for his refusing to be sworn.—Such objection can only be urged against a specific question.—

Where the affidavit on which an order for such an examination was granted, stated that the party wished to ascertain whether certain facts existed or not, it clearly indicated what he desired to prove.

Where, in an action by an administratrix to recover damages for the death of her intestate, alleged to have been caused by the defendant's negligence, an order for the examination of a defendant as a party before trial was granted, and the defendant objected to being sworn and examined on the ground that negligence being now punishable as a crime, he might be compelled to criminate himself, —*Held*, that the fact that questions might be put, the answers to which would tend to criminate the witness, afforded no justification for his refusing to be sworn;[¹] that the objection was premature, and involved as against an entire examination a personal privilege which could only be urged as against a specific question.[²]

Where the affidavit on which an order for the examination of a defendant before trial, alleged that the plaintiff's attorney wished to ascertain whether certain facts existed,—*Held*, that it clearly enough indicated what he desired to prove.[³]

Corbett v. De Comeau (4 Abb. N. C. 252), followed.[¹]
(Decided August 11, 1883.)

Greismann v. Dreyfus.

Motion to vacate an order for the examination of one of the defendants as a party before trial.

An order for the examination of Achille Dreyfus, one of the defendants, was granted upon an affidavit made by plaintiff's attorney, which, after stating the names and addresses of the parties, and the names and office addresses of the attorneys by whom they had appeared, continued as follows:

"That the nature of this action is as follows:

"Mary Greismann, the plaintiff, as administratrix of the goods, chattels and credits of Edward Greismann, deceased, sues for five thousand dollars damages, sustained by her, and the children and heirs of said Edward Greismann, deceased, through the death of said Edward Greismann, who died on the 4th day of April, 1883, at the city of Brooklyn, in consequence of and through injuries which he sustained on the 29th day of March, 1883, at the said factory of the defendants, in the city of Brooklyn, in the employment of the defendants as one of their workingmen in said factory, while in the discharge of duties as such workingman, through the negligence and carelessness of the defendants, through the unsafe and defective construction and condition of the machinery used by the defendants in and about the work performed by said Edward Greismann, deceased, and by the failure and wrongful omission of the defendants to supply safe, secure and well-constructed machinery for said work, and without any fault or negligence on the part of said deceased, said plaintiff having been appointed administratrix, as aforesaid, on the 25th day of May, 1883, by the surrogate of Kings county, and having duly qualified as such and entered upon the duties of her said office. The substance of the judgment demanded in the complaint herein is the sum of five thousand dollars and the costs of this action. That the defendants

Greismann v. Dreyfus.

have served an answer to the complaint herein, in which they admit that they are copartners, as alleged in the complaint, and that on the 29th day of March, 1883, said deceased was in the employ of said defendants; that they have no knowledge or information sufficient to form a belief as to the allegation that plaintiff was appointed administratrix, as above recited, deny each and every allegation in said complaint contained, not expressly admitted or referred to above stated, and then, for a further and separate defense, allege: that the machinery, pipes and connections about which said Edward Greismann was employed at the time of the accident referred to in said complaint, were in every respect securely and properly made and constructed, and were in every respect safe, suitable and proper for the purposes for which the same were employed. That whatever harm or injury was suffered by said Edward Greismann, in said employment, was wholly caused by his own negligence in standing directly in front of, instead of under or beside, as he had been instructed to do, the closed end of a certain horizontal pipe, used for the discharge of boiling water, and while so standing, contrary to his instructions, directly in front of the end or mouth of said pipe in unscrewing and removing therefrom the cap that closed the same, allowing of the discharge of said boiling water; that said Greismann contributed to the injury received by him by his further gross negligence in not closing, before removing said cap, the valves which cut off the connection between the boiler and the mouth or end of said pipe near the end of said pipe, as he had been instructed and was accustomed to do; that said Greismann further contributed to his said injury by his failure to open, before removing said cap, the valve into a certain escape pipe of the water standing therein; that valves and escape pipe were designed and fully adequate to secure the safety of the

Greismann v. Dreyfus.

workmen in drawing off the boiling water into the vats, and were a perfect protection against danger in so doing, and were in perfect working order at the time said Greismann was injured ; and that said Greismann was perfectly acquainted with said valves, and with their use and operation, and had used them daily with safety for a long period of time prior to his injury ; that whatever harm or injury was suffered by said Edward Greismann, in said employment, was wholly due to his own negligence and carelessness, and wholly without any fault of the defendants, which answer is verified by one of the defendants, Achille Dreyfus, who, as deponent, is informed and verily believes, superintends the workmen engaged by the defendants in said factory, and is personally well acquainted with the machinery, pipes and valves mentioned in the complaint and answers herein, and with the work which Edward Greismann, in his life-time, performed for the defendants.

“That deponent desires to examine the defendant, Achille Dreyfus, as a party or witness, before trial, on behalf of the plaintiff herein. That the testimony of said Achille Dreyfus is material and necessary for the plaintiff herein, and that the plaintiff cannot safely proceed to the trial of this action without such examination, for the following reasons, which contain also some of the facts and matters in regard to which deponent desires to examine said Achille Dreyfus, to wit: The plaintiff and this deponent have but a very vague idea of the construction of the machinery at which said deceased was employed, and deponent therefore desires to examine said Achille Dreyfus at large, about the construction of said machinery, the working and objects of said pipes, valves and connections, and the purposes for which the boiling water and steam were used ; also about the instructions

Greismann v. Dreyfus.

which, as defendants claim in their answer, said deceased received, whether it was a usual thing for the steam or hot water to be discharged from the closed end of the horizontal pipe when a person stood in front thereof, as claimed in defendant's answer, while the cap that closed the said end was being unscrewed and removed therefrom, and thus such instructions to stand under or beside the end of said pipe became necessary; whether any accident similar to the one described in the complaint and answer happened to any other workmen of the defendants previous to the one in question, whether the machinery used by the defendants would not have been rendered more secure and safe by additional precautions and appliances thereto; and whether, as a matter of fact, the same was not repaired and rendered more secure and safe immediately after the injury of said deceased, by additional appliances and repairs to said machinery; whether the defendants had an authorized and licensed engineer upon their said premises, and whether it was not the exclusive right and privilege of such engineer to shut off and open steam valves belonging to such machinery; whether such engineer had any instructions from the defendants to attend to the shutting and opening of such steam valves, and whether said engineer was in actual attendance in said factory at the time of said accident.

"Deponent also desires to ascertain through said examination, who was present at and witnessed the injuring of said deceased, also, what were the duties of the deceased in and about the work which he performed in said factory for the defendants, and various other matters touching the subject of this action and the defense."

The defendants moved upon this affidavit to have the order granted thereon vacated.

7

Greismann v. Dreyfus.

Stern & Thompson, for the motion.

Henry Fuehrer, opposed.

McCUE, J.—The plaintiff seeks to examine the defendant, Achille Dreyfus, as a witness before trial under an order of the court granted in accordance with the Code, upon an affidavit of the plaintiff's counsel showing the need of such examination. The action is brought to recover damages for negligence causing the death of plaintiff's husband. The defendant by his counsel objects to being sworn and examined, on the ground that negligence being now punishable as a crime, he may be compelled to criminate himself. That questions might be put, the answers to which would tend to criminate the witness, affords no justification ['] for refusing to be sworn, as was held in *Corbett v. DeComeau*, 4 Abb. N. C. 253.* Now the Code

* S. C., 54 How. Pr. 506. In *Yamato Trading Co. v. Brown* (27 Hun, 248; S. C., 63 How. Pr. 388), it was held that an order for the examination of a party before trial should not be granted where the entire object of the examination sought is to show by the party that he has procured property by means of false and fraudulent representations. In *Burbank v. Reed* (11 Weekly Dig. 756, opinion reported in 1 N. Y. Civ. Pro. 42), it was held that an order for the examination of a party before trial was improperly granted where the affidavit on which it was granted showed that the examination was necessary only for the purpose of showing facts which might subject the party examined to a criminal prosecution.

In *Russ v. Campbell* (1 N. Y. Civ. Pro. 41), which was an action by a judgment debtor to set aside a conveyance and chattel mortgage on the ground of fraud, the general term of the supreme court, second department, vacated an order for the examination of the defendant before trial, on the authority of *Burbank v. Reed* (*supra*), but in *Tenney v. Mautner* (1 N. Y. Civ. Pro. 64), a judgment creditor's action to set aside a general assignment for the benefit of creditors as fraudulent, the general term of the supreme court, first department, sustained a similar order. The ruling in the following case accords with that in *Yamato Trading Co. v. Brown* (*supra*).

Greismann v. Dreyfus.

provides in substance, that a party may be examined as a witness before trial as if upon trial. If called upon he could not refuse *in toto* to testify, on the ground that his testimony might criminate himself, but would only have the privilege of refusing to answer questions

WALKER v. DUNLEVY AND ANOTHER.

N. Y. MARINE COURT, SPECIAL TERM, MAY, 1883.

§§ 837, 870, *et seq.*, 880.

Examination of party before trial.—Order for, should be denied where it will necessarily compel party examined to invoke protection of court.—Order for, should not be granted in action where the only issue is the criminality of the witness sought to be examined.

Where it appears that an order for the examination of a party before trial would, of necessity, compel him to invoke the protection of the court, the order should be denied.[¹]

An order for the examination of a defendant before trial at the instance of the plaintiff as to his solvency or insolvency, in an action to recover the value of certain goods and merchandise alleged to have been sold to defendant on the faith of representations that he was financially responsible, when in fact he was wholly insolvent, should not be granted. While insolvency is not itself a crime, testimony as to it would be good only so far as it furnished a link in the chain of proof that defendant had committed a crime, and any one question which has that effect is as objectionable as any other.[²]

The court is bound to take notice of the object of an examination of a party before trial, and where the only issue in the case is a criminal act of the defendant sought to be examined, an order therefor should be denied.[³]

Phoenix v. Dupuy (3 Abb. N. C. 146), approved; [³] Corbett v. De Comeau (54 How. 506), distinguished.[⁴]

(Decided May, 1883.)

Motion to vacate an order for the examination of the defendant Dunlevy before trial.

The complaint alleged that the plaintiff, relying on the defendant Dunlevy's statement that he was solvent, and upon certain representations made by him as to his financial responsibility, sold and delivered to him certain goods and merchandise, and upon the plaintiff's information and belief, that such statement and representations were false and fraudulent, and the said defendant was, and knew that

Greismann v. Dreyfus.

having that tendency. By analogy, I think the same rule should apply to the examination before trial. ['] The present objection is premature. It involves as against an entire examination a personal privilege which can only be urged as against a specific

he was at the time of the sale and delivery of such goods and merchandise, wholly insolvent and unable to pay therefor.

An order for the examination of the defendant Dunlevey was granted on an affidavit made by plaintiff stating that the object of the examination was to ascertain "whether the defendant, at the time the goods and merchandise mentioned in the complaint were sold and delivered to him, was solvent, and able to pay his debts as represented by him to deponent when said goods and merchandise were purchased." This motion was to vacate said order.

Samuel Keeler, for the motion.

Abram Kling, opposed.

HAWES, J.—All parties substantially agree that a defendant can decline to answer a question which will criminate him; and I think that if it appear, that such an examination before trial would, of necessity, compel a party to invoke the protection of the court, then the order should be denied. The ruling in *Phoenix v. Dupuy* (2 *Abb. N. C.* 146), is clearly in accordance with the best practice. The examination in this case, on its face, is ordered merely to determine the solvency or insolvency of the defendant, and it may well be said that insolvency is not in itself criminal, and the court would not interfere for the protection of the party from the discovery of that fact. But such testimony would be subject to the objection of immateriality, if not taken in view of the complaint which charges fraud in the representation as to his solvency. In other words, such evidence is good only so far as it furnishes a link in the chain of proof that defendant has committed a crime; and any one question which has that effect is as objectionable as any other; for, if the principle is correct in any phase of the case, it is correct in all phases. The proof as educed, would lead only in one direction. The court is bound to take notice of the objects of the examination, and the only issue in the case at bar is the criminal act of the defendant, and in view of what I deem the well-settled rule, this order, which is discretionary in its character, should be denied. The case of *Corbett v. De Comeau* (54 *How.* 506), holds that the order should be granted, and the court should pass upon the question of the witness' privilege when he raised it, but this case rested upon the

Greismann v. Dreyfus.

question. To rule as defendant requests, would exempt him from testifying and nullify the provisions of the Code. The objection is also made in defendant's brief, that it is not sufficient to allege that the ['] party desires to prove certain facts, but that the facts must be alleged to exist. The plaintiff's counsel alleges that he wishes to ascertain whether certain facts exist or not, and I think clearly enough indicates what he desires to prove. The order for examination is therefore to stand without costs.

view that the examination of a party before trial was a matter of right and not of discretion. This construction is no longer held by any court in the department, and the case cannot, therefore, be deemed authority. The papers are insufficient in many other respects, and the order must be dismissed, with costs.

In *Canada Steamship Co. v. Sinclair* (*N. Y. Super. G. T. May*, 1888, 8 *N. Y. Civ. Pro.* 284), it was held that the right of a witness to refuse to answer a question which would tend to convict him of a crime, is a personal privilege, and should be urged when he is asked the questions having such a tendency; that an order for the examination of a party before trial should not be set aside, unless it appears that the testimony sought to be obtained related *exclusively* to facts which, if proven, would show that the witness was guilty of a crime.

See also the cases cited in note on examination before trial (1 *N. Y. Civ. Pro.* 75).

Hoffman v. Ridley.

HOFFMAN, AN INFANT, BY HOFFMAN, HER GUARDIAN
AD LITEM, v. RIDLEY, ET AL.

N. Y. MARINE COURT, SPECIAL TERM, MARCH, 1883.
§ 3277.

*When court not divested of jurisdiction of motion by entry of judgment.
—Court has power to discontinue an action without costs; it rests in
sound discretion.—An infant plaintiff, unable to comply with
an order requiring her to give security for costs, should be
allowed to discontinue an action for personal injuries,
without costs.*

Where a plaintiff procured an order to show cause why she should not be permitted to discontinue an action without costs, and the defendant, before the return day named in such order, entered judgment under an order dismissing the action on account of plaintiff's failure to file security for costs,—*Held*, that no exception could be taken to the regularity of the defendant's course in entering judgment, but that the consideration of the question proposed by the order to show cause, was virtually before the court at the time judgment was entered, and the court was not thereby divested of jurisdiction.

Where, in an action brought by an infant by her guardian *ad litem*, to recover damages for personal injuries alleged to have been received through the negligence of a servant of the defendant, the plaintiff was required to pay into court the sum of \$250, or file an undertaking in that amount, and she was unable to do so,—*Held*, that the court has the power to discontinue an action without costs,—it rests in sound discretion, and that this case is eminently a proper one for the exercise of such power.

(Decided March 22, 1883.)

Motion to vacate judgment and to discontinue action without costs.

The defendants procured an order requiring plaintiff to pay into court the sum of \$250, to be applied to the payment of the costs, if any, awarded against her,

Hoffman v. Ridley.

or at her election to file with the clerk an undertaking, as provided in sections 3272 and 3273 of the Code of Civil Procedure.

The plaintiff being unable to comply with the order, procured an order requiring the defendants to show cause why she should not be allowed to discontinue the action without costs. Before the return day named in the order, the defendants entered judgment dismissing the action pursuant to an order they had theretofore obtained, which dismissed the action for plaintiff's failure to give security for costs. The plaintiff thereupon made this motion.

C. D. Rust, for the motion.

E. P. Wilder, opposed.

HYATT, J.—No exception can be taken to the regularity of the course of defendant's attorney, in entering judgment of dismissal under the order herein of Mr. Justice HALL. Prior to such action, however, the plaintiff obtained an order to show cause why the plaintiff should not be permitted to discontinue without costs, by reason of inability to give the security heretofore required by order of this court, and why the said judgment should not be vacated.

I am of the opinion that the consideration of the proposed question was virtually before the court at the time of the said entry of judgment, and that the court has not been divested of jurisdiction thereby.

This action is brought to recover damages alleged to have been sustained by an infant, by being run over by a horse and wagon driven by the alleged servant of the defendant.

The defendant has obtained an order requiring plaintiff to pay into court the sum of \$250, or file an undertaking in that amount.

Hoffman v. Ridley.

The father of the plaintiff, who is her guardian ad litem, has been unable to comply with the said order.

The plaintiff is thus debarred from any redress, whatever may be the merits of her case, which is certainly a hardship sufficient to entitle her to discontinue without costs. The defendant should be satisfied with the exemption thus afforded him from defending the action with its possible result.

The court has power to discontinue an action without costs; it rests in sound discretion (*Barante v. Deyermant*, 41 *N. Y.* 355; *Steiger v. Schultz*, 3 *Keyes*, 616).

In my opinion, this case is eminently a proper one for the exercise of this power. Motion to vacate judgment, and to discontinue action without costs granted. No costs of motion.

Albert Palmer Co. v. Van Orden.

THE ALBERT PALMER COMPANY v. VAN
ORDEN, APPELLANT.
DILL AND ANOTHER, RESPONDENTS.

N. Y. SUPERIOR COURT, GENERAL TERM, JANUARY,
1883.

§ 66.

Attorney's lien for costs.—Attorney, whose claim was settled after action began, and before answer, without satisfying his lien for costs, may, if the defendant fails to answer, enter judgment.—Where, in such a case, judgment was entered for \$87.50, interest and costs, and the attorneys' fees were to be all above \$50 recovered in the action and costs, and the action was settled for \$50, the judgment should be reduced to \$50 and costs.—In such a case, a trial should not be had at the expenses of both parties to determine whether the recovery would be more than \$50.—Defendant moving to open default in failing to answer, should serve with motion papers, a copy of his proposed answer, but his failure to do so is not fatal if there is an affidavit of merits, and it appears what his defense will be.*

A defendant moving to open a judgment taken against him by default, is bound to show affirmatively what his defense is. Strictly, he should serve with his motion papers a copy of his proposed answer, but his failure to do so is not a fatal objection when there is an affidavit of merits in the usual form by the defendant, and an affidavit by his attorney that he has a good and substantial defense upon the merits, and the moving papers show what is the defense intended.^[2]

Where the parties to an action settled it for less than the amount claimed in the complaint, without the concurrence of the plaintiff's attorneys, and the costs of the action were not regarded by either party, and the plaintiff's attorneys' lien therefor was not satisfied,—

* See *In re Wilson and Greig*, 2 N. Y. Civ. Pro. 843; *Dimick v. Cooley*, 8 *Id.* 141, and cases cited in each opinion.

Albert Palmer Co. v. Van Orden.

Held, that the plaintiff's attorneys were not bound to stay proceedings in the action or to discontinue without costs,^[1] and were not irregular in entering judgment for default of an answer;^[2] that the settlement was not a bar to the action from the time of its beginning but to the continuance of the action after the settlement, and involved the defendant's paying the costs to the time of the settlement at least, unless he alleged and proved that the compromise included the costs.^[3,4]

An action brought to recover \$87.50 and interest, was settled by the parties for \$50. The plaintiff's attorneys, who had no part in the settlement, upon learning of it, gave notice that they had a lien upon the cause of action for their fees and costs. They had agreed with the plaintiff that their fees should be all over \$50 recovered in the action and taxable costs, and upon the defendant's failure to answer they entered judgment for \$87.50 amount of claim, \$11.19 interest, and \$18.58 costs, and gave the defendant a certificate that the judgment had been partially satisfied by the payment of \$50 on account,—*Held*, on a motion to open the defendant's default for the purpose of allowing him to plead the settlement, that the attorneys' lien was upon the actual cause of action, and not upon the alleged cause of action;^[5] that there was no proof that the plaintiff had other than a legal right to recover \$50;^[6] that neither the complaint nor the defendant's default in answering, proved that the amount claimed was owing in view of the settlement;^[7] that the plaintiff's attorney must show that the amount claimed was due,^[8] and this could not be done by proceeding with the action at the expense of both parties;^[9] that the attorney had a lien for his taxable costs,^[10] and if the judgment had been only for \$50, the amount of the settlement and costs, and satisfied as to the amount of the \$50, the defendant would not have been entitled to any relief;^[11] that the judgment should be modified so as to reduce the recovery to \$50 and taxable costs.^[12]

(Decided February 19, 1883.)

Appeal by defendant from order denying motion to open judgment entered for want of answer.

The action was to recover the sum of \$87.50 upon contract. Before the time to answer had expired, the parties, without the intervention of the attorneys, made a settlement, by which the defendant paid to the plaintiff the sum of \$50, in satisfaction of the claim

Albert Palmer Co. v. Van Orden.

made in the complaint. It did not appear, evidently, that the settlement included the costs of the action. No answer was served, and for the want of answer the plaintiff entered judgment for the sum of \$87.50; \$11.19 interest thereon, and \$18.58 costs, in all, for \$117.27. After entry of judgment, its satisfaction to the extent of \$50 was made by the plaintiff, as if the \$50 had been paid on account.

The defendant moved to set aside the judgment, and for leave to serve answer on the ground of the settlement.

The plaintiff's attorneys claimed that they and plaintiff had agreed, before action began, that their compensation was to be the taxable costs and the amount of the recovery above \$50, and they had a lien upon the cause of action and the judgment in the amount of the judgment after the application of the \$50, citing section 66, Code of Civil Procedure.

Further facts are stated in the opinion.

H. B. Whitbeck, for appellant.

The parties had an absolute right to settle before judgment, regardless of plaintiff's attorneys. The good faith of the settlement is not impeached. *Goddard v. Trenbath*, 24 *Hun*, 182; *Sullivan v. O'Keefe*, 53 *How. Pr.* 426. The plaintiff's attorneys had no right to enter judgment after settlement. They were irregular; they had no right to proceed with the action after the settlement (of which they had knowledge) without first obtaining leave from the court. *Goddard v. Trenbath*, *supra*.

James B. Dill (*Dill & Chandler*, attorneys), for the respondents.

To entitle a party moving to open a default to relief, he must serve with the moving papers a copy of the proposed answer, and must show the court specifically

Albert Palmer Co. v. Van Orden.

in what his defense consists. Mere general allegations will not answer. 3 *Wail's Practice*, 665, 666; *Ellis v. Jones*, 6 *How. Pr.* 296; *Hunt v. Wallis*, 6 *Paige*, 371; *Marquisee v. Brigham*, 12 *How. Pr.* 399; *Catlin v. Lawson*, 13 *Id.* 511. . . .

The judgment is valid because of the attorney's lien, and the notice thereof to the defendant. The defendant is confined to the grounds and irregularities set out in his order to show cause. *Montrait v. Hutchins*, 49 *How. Pr.* 105; *Graham v. Pinckney*, 7 *Robt.* 147; *Lewis v. Graham*, 16 *Abb. Pr.* 126; *Selover v. Forbes*, 22 *How. Pr.* 477; *Barker v. Cook*, 40 *Barb.* 254. Questions of irregularity cannot be heard upon appeal for the first time. *Derham v. Lee*, 47 *N. Y. Super.* 174.

The defendant and his attorney were notified of the existence of the attorneys' lien before the bringing of the motion.

The defendant is not in a position under his moving papers to avail himself of any claim of irregularity in the manner or the time of the service of this notice of lien, inasmuch as the irregularity is not specified in the moving papers. Therefore, under the decisions rendered before the amendment to section 66 of the Code in 1879, the lien of the plaintiff's attorneys is valid, and the judgment cannot be satisfied to the extinguishment of this lien. *Coughlin v. N. Y. Central & Hudson River R. R. Co.*, 71 *N. Y.* 443; *McGregor v. Comstock*, 28 *N. Y.* 237; *Wright v. Wright*, 70 *N. Y.* 98.

The judgment is valid because of the attorneys' lien.

No notice of lien is necessary under section 66 of the Code of Civil Procedure, as amended in 1879. . . .

An attorney has a lien both under the common law and under the Code. *Ex parte Bush*, 7 *Viner's Abr.* (Edition of 1734), 74; *Wilkins v. Carmichael*, 1 *Doug-*

Albert Palmer Co. v. Van Orden.

lass, 101 ; 2 *Kent Comm.* 641 ; *In re Wilson and Greig*, 2 *N. Y. Civ. Pro.* 343, and cases cited ; *In re Knapp*, 85 *N. Y.* 285 (294) ; *Code Civ. Pro.* § 66.

This lien is upheld on the theory that his services and skill procured it. *Coughlin v. N. Y. Central & Hudson River R. R. Co.*, 71 *N. Y.* 443 ; *Cowl v. Simpson*, 16 *Vesey*, 279 ; *Ex parte Yalden*, *L. R.*, 4 *Ch. Div.* 129.

It extends to compensation and disbursements.

Before the Code of Procedure, the lien was limited to the taxable costs, and after the enactment of the Code of Procedure abolishing the fee bill (§ 303), the lien was extended to any agreed or proper compensation, and the attorney was regarded as an equitable assignee of the judgment to that extent. *Booney v. Second Ave. R. R. Co.*, 18 *N. Y.* 368 ; *Marshall v. Meech*, 51 *N. Y.* 140 ; *Coughlin v. N. Y. Central & Hudson River R. R. Co.*, 71 *N. Y.* 443 ; *In re Knapp*, 85 *N. Y.* 285. The Code of Civil Procedure, until amended in 1879, made no changes on the law. *McBratney v. Rome R. R. Co.*, 17 *Hun*, 388. . . . This amendment changes the former rule in two respects. 1st. By making the lien attach to the cause of action instead of the judgment and attaching from the commencement of the action. 2d. Whereas the rule formerly was, that a settlement between the parties in good faith, without notice, cut off the attorney's lien, the Code now declares that this lien cannot be "affected by any settlement between the parties before or after judgment." . . .

This amendment makes the lien absolute (*Lansing v. Ensign*, 62 *How. Pr.* 363) and makes it statutory, and there is no necessity of giving notice of a statute.

The practice of the plaintiff's attorney in entering judgment was proper. . . .

The proper practice for an attorney claiming a lien even after a discharge on the record, is to proceed with

Albert Palmer Co. v. Van Orden.

the action to judgment and collection in the name of his client. *Foreman v. Edwards*, (Gen. Term, Fourth Dep. April, 1882,) 14 *Weekly Dig.* 409, citing 71 *N. Y.* 443; *McCabe v. Fogg*, 2 *Monthly L. Bull.* 71; *Wilbur v. Baker*, 24 *Hun*, 25.

SEDGWICK, J.—On the affidavits below the defendant was not entitled to a finding that the settlement made between the parties included the costs of the action as well as the cause of action. The plaintiff disputed that it did. And the affidavits seem to show that the costs of the action were not regarded by either party. I do not perceive that under the facts of the case, especially the character of the settlement, the ['] plaintiff's attorneys were bound to stay proceedings in the action, or to discontinue without costs. The defendant, in order to prevent the consequences of not serving an answer, should have served one, setting up such defense as might be made.

If he chose to rely upon the compromise and not upon a denial of any indebtedness, such a defense would involve the defendant being responsible for ['] the costs of the action up to the time of settlement, at least, unless he alleged and proved that the compromise included the costs.

The plaintiff not being irregular in entering judgment, for default of answer on the motion to open default and allow the defendant to plead, there were at least two questions.

One was to what extent did the defendant show that he had a defense to the action; the other was, on what terms should he be allowed to defend.

Under the first question the defendant was ['] bound to show affirmatively what his defense was.

Strictly, he should have served with his motion papers a copy of the proposed answer. He presented an affidavit of merits in the usual form, and his attor-

Albert Palmer Co. v. Van Orden.

ney also made an affidavit as to a good and substantial defense upon the merits. As matter of practice, this, by itself, would not have been sufficiently specific, and if nothing more had been shown as to a defense, it would have required a denial of the motion. The papers in other parts show, however, what was the defense intended, and the order to show cause stated, as ground for the relief asked, "that the claim upon which the action was founded had been paid and settled in full prior to the entry of said judgment." It has been already said, that this defense, properly pleaded, would not have been a bar to the action from the time of its beginning, but to the continuance ['] of the action after the settlement, and would involve the defendant's paying the costs to the time of settlement. If thereupon, the judgment had been only for \$50, the amount of the settlement, ['] and the costs of the action, with a satisfaction as to the amount of the \$50, the defendant would not have been entitled to relief, and the motion would have been properly denied with \$10 costs.

In that event it would not have been necessary to determine what terms should be imposed upon the defendant as a condition of opening a judgment that had been legally taken. The papers for plaintiff show that they did compromise the claim made in the complaint for the \$50, which the defendant paid, and that their attorney knew that a settlement had been made so far as the claim was concerned. The plaintiff's attorneys wrote a letter to defendant's attorney, saying, that they understood that some money had been paid without their knowledge. "We shall not ratify the settlement unless our costs are paid and our liens discharged." A letter of this defendant admits simply the settlement of the claims, but asserted that in making it nothing was said about the suit, and ended, "we prefer that you enforce your lien for the costs

Albert Palmer Co. v. Van Orden.

and services in the case against the subject-matter of the action." An affidavit of one of the attorneys for plaintiff, says: "that plaintiff's attorneys have a lien upon the judgment entered in the action for \$67.27, being the amount of their services, which were to be and are whatever amount was recovered over \$50 and the taxable costs; that the said lien is wholly unpaid and wholly unsatisfied, and the plaintiff refuses to pay the same, and the validity thereof depends upon the judgment entered herein, which stands of record to the amount of lien only." This seems to be hardly more than a statement of certain admissions of the affidavits, and not to contain a statement of facts as to any agreement between the parties as to the compensation of the attorneys.

The judge below, would have been justified in holding that the plaintiff's attorneys did not show that there had been an express agreement as to compensation. If, however, it be taken that there is enough to show that there was an agreement that the attorney should have as compensation the taxable costs and whatever amount beyond \$50 might be recovered, the practical result, in my judgment, should be the same.

Under the notion that the attorneys had, under section 66 of the Code of Civil Procedure, a lien for the amount of their compensation of the kind indicated, upon the cause of action, which attached to the judgment when entered, they proceeded to enter judgment for the whole amount claimed in the complaint of \$87.50, and as interest, \$11.19, and \$18.58 as costs and disbursements.

They afterward satisfied this to the extent of \$50, calling it in the satisfaction piece "part payment" of the judgment.* It has been noticed that the plaintiff's

* This satisfaction piece was executed by the plaintiff's attorneys, the respondents herein, and delivered to and retained by the defendant's attorney.—[Ed.]

Albert Palmer Co. v. Van Orden.

attorneys do not deny that as between the parties to the action, the cause of action has been definitely settled. The only fault to the contrary is that the attorneys chose to apply the \$50 to the judgment as if it were a payment on account. They had no authority to make this use of the amount. This error will not affect the result. The attorneys claim, that although there was this sufficient and valid compromise, nevertheless, as they had a lien, they can prosecute the action on its original merits disregarding the compromise.

It will not be necessary to give a full construction of section 66, for in my judgment it is not necessary to go further than to say, that the lien is upon the actual cause of action, and not upon the alleged ['] cause of action. A cause of action is as it is, and has its validity without its being stated in the pleading. What proof is there here that the cause of action which the plaintiff had is other than a legal right to recover \$50? I do not see anything to show that plaintiff was entitled to recover more than this amount. This has to be shown as against the defendant.

Against him the complaint does not prove it. ['] Nor does his default of an answer prove it, in view of the facts shown which include the settlement. The plaintiff's attorneys claim the power to proceed with the action irrespective of the other manifest right of the plaintiff to agree to a compromise, and this power is claimed because the attorneys assert a lien. Assume that the parties had no right to agree that the amount due was less than in fact it was, the attorneys must show that the amount was due. There is no proof of this. In truth, the attorneys claim the ['] right to proceed with the action for the purpose of showing that more than \$50 was due. At least, such is the nature of the claim, and is its essential character, as would be shown if an answer had been

Cupfer v. Frank.

served. Parties, however, do not always succeed in proving what they assert. The plaintiff might be unsuccessful, and it would then appear that the attorneys had no lien, beyond the taxable costs. The experiment that the theory of the respondent proposes should not be made at the expense of both the parties.

What has been said does not refer to the taxable costs. It would appear that the attorneys had a lien for them. The motion should have been denied as to them. The judgment as to the amount of recovery should have been reduced to \$50. It was correct to provide that the motion costs be paid by the defendant.

Although the result requires a modification of the order made below, it seems to me to be in accordance with *McCabe v. Fogg*, 2 *Monthly L. Bull.* 7.

Order modified as indicated above, without costs to either party.

TRUAX and O'GORMAN, JJ., concurred.

CUPFER, RESPONDENT, v. FRANK, IMPLEADED,
ETC., APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, JANUARY, 1883.

§§ 1365, 1375.

Execution.—May be issued of course within five years after right to issue has fully accrued.—Instance of an injunction order which should not be vacated.

By sections 1365 and 1375 of the Code of Civil Procedure, it was intended to limit the time within which executions may issue of course upon any judgment to the period of five years after the right

Cupfer v. Frank.

to issue the same had fully accrued.^[1] Accordingly, *Held*, where judgment of foreclosure and sale, in an action to foreclose a mortgage, was rendered September 5, 1876, and the referee's report of sale was made and dated October 25, 1876, and showed a deficiency for which judgment was docketed January 22, 1878, that the right to issue execution did not accrue until the judgment was duly docketed, and that an execution issued on said judgment, December 13, 1882, was issued within five years.^[1]

Where, in an action in the nature of a creditor's bill to secure the application upon a judgment on which execution has been issued and returned *nulla bona*, of a certain policy of insurance or claim against an insurance company in favor of a judgment debtor, the judgment debtor appealed from an order enjoining her from assigning such policy or claim, on the ground that she, being a married woman, could not assign her interest in it. *Held*, that, inasmuch as if it be true that the judgment debtor has no power to make any assignment of the policy or claim, she will not be harmed by having the injunction remain, while on the other hand, if she has such power, the plaintiff in the action might lose his remedy if she were not restrained, the injunction should not be vacated.^[1]

(Decided May 11, 1883.)

Appeal by the defendant, Mary Frank, from an order restraining her from assigning a certain policy of insurance, or claim against an insurance company in her favor.

The opinion states the facts.

Townsend, Dyett & Einstein, for appellant.

Ezra A. Tuttle, for respondent.

DAVIS, P. J.—This is an action in the nature of a creditor's bill, founded upon a judgment and an execution issued and returned *nulla bona*, and it seeks assets of the appellant to be applied upon such judgment. The assets consist of a claim against the Mutual Life Insurance Company, arising upon a policy of insurance, in the name of the appellant, on the life of

Cupfer v. Frank.

her husband. The only question that seems to have been presented at special term was whether the complaint shows an execution duly issued within five years from the time the judgment was rendered. The allegations of the complaint are sufficient upon that question to show the issuing of an execution within that time; but it is shown by affidavit that the judgment was for deficiency arising upon the sale of mortgaged premises in an action of foreclosure, and it is also shown that the judgment of foreclosure and sale was rendered on September 5, 1876, and that on October 25, 1876, the referee's report of sale was made in the action bearing date on that day, which shows a deficiency, for which the judgment was docketed on January 23, 1878. If such docketing was the entry of the judgment within the meaning of the Code, then the issuing of the execution on December 13, 1882, was within five years. The Code provides (§ 1375) that executions may issue of course at any time within five years after the entry of the judgment, and by section 1365, that an execution against property can be issued only to the sheriff of the county, in the clerk's office of which the judgment is docketed.

We are inclined to think that the court below was correct in construing these sections as authorizing the issuing of execution in this case. On the filing of the referee's report of deficiency, the judgment declaring the liability of the defendants for such deficiency was not brought to a condition in which execution could issue; therefore something more was necessary to be done, and we are of opinion that the sections referred to of the Code, are intended to limit the time within ['] which, executions may issue of course upon any judgment to the period of five years after the right to issue the same has fully accrued. In this case the right did not accrue until the judgment was duly docketed, and that not having been done until the time

Cupfer v. Frank.

above named, the execution is shown upon the facts to have been issued within five years.

Another point is now urged, which is in substance that the interest of the appellant in the policy of insurance or claim against the insurance company was not assignable, and therefore cannot be reached by execution. The circumstances of the case are peculiar, and the decisions referred to on the subject of the non-assignability of a married woman's interest in a policy are not in all respects analogous to those of this case. It may very well be held on the trial of this action, that those cases control that question; but it would seem from what appears in the papers before us, that restraining the assignment of the policy or claim can be of no special injury, provided the action is brought to trial with proper diligence, inasmuch as, if it be true that Mrs. Frank has no power to make any assignment of the policy or claim, she will not be harmed by having the injunction remain, while on the other [?] hand, if she has such power, the plaintiff in the action might lose his remedy, if she were not restrained.

We are of opinion therefore, on the whole, that the injunction should not, on that ground, be vacated, but be allowed to remain until the trial of the action, in which this question of the assignability of the policy or claim can be finally determined.

DANIELS and BRADY, JJ., concurred.

Estate of Hewitt.

ESTATE OF EDWARD HEWITT, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, MAY, 1883.

§§ 2527, 2557—2560, 2560.

Costs of appeal from surrogate's decree.—Surrogate has no power to award or order payment of, except as directed by the appellate court.—Where appellate court has awarded costs, but has made no direction as how they shall be paid, the surrogate may exercise his discretion in particular in which the appellate court has failed to exercise it.—Functions of special guardian cease with entry of surrogate's decree.—If special guardian, recognized as guardian ad litem in appellate court on appeal from surrogate's decree, although not regularly appointed as such, he is entitled to compensation for his services.

The functions of a special guardian of minor children appointed by the surrogate on an application for the probate of an alleged last will and testament, cease with the entry of the surrogate's decree in such proceeding, and he is neither required nor empowered by virtue of his office to represent the infants thereafter.^[1] If the interests of an infant need protection in proceedings upon appeal from the surrogate's decree, it is the province of the appellate court to appoint for that purpose a guardian *ad litem*.^[2]

If, on appeal from a decree of a surrogate, the appellate court, although it has made no formal selection of a guardian *ad litem* of infants interested in the proceeding, has practically recognized as such a special guardian appointed by the surrogate, the person so recognized may thereby become entitled to compensation for services rendered in the appellate court;^[3] but, however meritorious his claim for compensation, it cannot be enforced in the surrogate's court.^[4] He must resort for relief to the appellate tribunals wherein he rendered the services, and in the absence of directions from those tribunals, the surrogate has no authority to make any provision for his compensation.^[4, 5, 6]

A surrogate cannot, under any circumstances, order payment of appeal costs save in obedience to the direction of an appellate court.^[5, 6, 7]

By sections 2558 and 2560 of the Code of Civil Procedure, it was not intended to give the surrogate a right to award costs on appeal,

Estate of Hewitt.

but only to provide for their insertion in a decree in cases where they may be lawfully awarded.[',''] The surrogate cannot adjudge that appeal costs be paid, where the court above has refused to award them or given no direction whatever, but if an appellate court has awarded costs, but has not given any direction whether the same shall be paid out of estate or fund, or by the successful party, the surrogate may exercise his discretion in the particulars wherein the appellate court has failed to exercise its own.[','']
(Decided March 8, 1883.)

Motion by a special guardian for an order awarding compensation to him for services rendered on appeal from a decree of the surrogate.

The facts are stated in the opinion.

John Delahunty, for the motion.

ROLLINS, S.—An instrument purporting to be the last will of Edward Hewitt was, in the year 1881, offered for probate in this court. A contest thereupon arose, which resulted adversely to the proponents. While that contest was pending, the applicant in the present proceeding was appointed special guardian of decedent's minor children. He represented them in the probate controversy, and by the surrogate's decree was allowed as compensation therefor the sum of \$25, which he has since received.

From this decree, which denied probate to the paper propounded as a will, an appeal was taken to the supreme court. A judgment of affirmance was there pronounced, which was itself subsequently affirmed by the court of appeals.

The special guardian alleges that during the pendency of these appellate proceedings he rendered services which are worthy of compensation, and he now asks that such compensation be awarded him out of the assets of the estate. In opposition to this claim, it is urged that the functions of the appli-

Estate of Hewitt.

cant as special guardian ceased with the entry of the surrogate's decree, and that he was neither required nor empowered by virtue of his office to represent the infants thereafter. This view, as it seems to me, is correct. If the interests of an infant need protection in proceedings upon appeal from the surrogate, it is the province of the appellate court to appoint for that purpose a guardian *ad litem* (Kellinger v. Roe, 7 Paige, 363; Underhill v. Dennis, 9 Paige, 202; Chaffee v. Baptist Miss. Soc., 10 Paige, 85; Moody v. Gleason, 7 Cowen, 482; Fish v. Ferris, 3 E. D. Smith, 567).

It is doubtless true that, if an appellate court, though it has made no formal selection of a guardian *ad litem*, has nevertheless practically recognized as such, one who has acted as special guardian before the surrogate, the person so recognized may become thereby entitled to compensation.

In the case at bar, for example, the moving party, for aught that is disclosed by the papers before me, may have been treated by the appellate courts as one entitled to represent the infants, whose interests in the surrogate's court, he had, as special guardian, been bound to protect. Accordingly, his claim to be compensated for services rendered in the proceedings upon appeal may have quite as good a foundation as if he had received an express appointment as guardian *ad litem*. But, however meritorious his claim may be, it cannot be enforced here. He must resort for relief to the appellate tribunals wherein he rendered the services. In the absence of directions from those tribunals, the surrogate has no authority to make any provision for his compensation.

Before the enactment of the Code of Civil Procedure, the statutes were silent both as to the amount which special guardians should receive in payment for their services, and as to the mode of procedure whereby

Estate of Hewitt.

payment for such services could be obtained. But it was in practice assumed that the right of the surrogate to appoint those officers involved the right to direct the payment to them of reasonable compensation. Any question as to the authority to give such direction seems to be now set at rest by the provisions of the Code.

Sections 2558-2565, inclusive, have to do with costs and allowances to executors, administrators, freeholders, appraisers, &c. Then follows section 2566, which declares that "each other officer, including a referee, and each witness is entitled to the same fees for his services . . . as he is allowed for like services in the supreme court."

While there is here no express mention of special guardians, the language is broad enough to cover such officers, and was intended, I think, to include them.

Now, if their right to be awarded compensation by the surrogate depends solely upon the authority ["] which this section confers, such award can only be made for services rendered in this court.

Aside from the section which has just been quoted, the only Code provisions which have any important bearing upon the matter under discussion are sections 2557, 2558, 2560 and 2589, which relate to costs awardable to parties in proceedings before the surrogate, and on appeal from that court. If, therefore, a special guardian's right to compensation is not to be tested by section 2566 alone, it is because the several sections above cited enlarge the authority of the surrogate, and permit him to grant an application like the present, even though no direction has been given by the supreme court or the court of appeals.

It is true that those sections contain expressions which fairly suggest the liberal interpretation here claimed for them—especially when considered by themselves, apart from other Code provisions *in pari*

Estate of Hewitt.

materia, and without reference to the state of the law upon this subject prior to September 1, 1880.

But if due heed be paid to the entire scheme of appellate procedure established by the Code, and to the general policy of the statutes before its enactment, it will be found that the claim here set up cannot be successfully maintained, and that under no circumstances can the surrogate order payment of appeal costs, save in obedience to the directions of an appellate court.

That he was confined within those limits just before the Code went into operation is too well settled to require discussion (*Morgan v. Morgan*, 1 *Abb. Pr. N. S.* 40; *Seguine v. Seguine*, 3 *Abb. Pr. N. S.* 442; *Dupuy v. Wurtz*, 47 *How. Pr.* 225; *Savage v. Gould*, 60 *How. Pr.* 255).

What change, if any, has since been effected? The Code declares, by its 2557th section, that "except where special provision is otherwise made by law, costs awarded by a decree may be made payable by the party personally, or out of the estate or fund as justice requires."

Manifestly no authority is here given or intended to be given for the award of costs, either upon the appeal or otherwise. The sole purpose of the section is to declare what person or fund is to be made chargeable with costs in cases where such costs are awarded. "Whenever you lawfully direct that costs be paid," it says to the surrogate, "you are at liberty, unless prevented by some positive statutory restriction, to exercise your discretion as justice may require, in directing that such costs be paid either by some party or parties to the proceeding, or out of the estate or fund." Section 2558 provides that the award of costs in a decree, is in the discretion of the surrogate, except in one of the following cases:

Then follow the exceptions:

Estate of Hewitt.

1. Where special directions respecting the award of costs are contained in a judgment or order made (a) upon an appeal from the surrogate's determination, or (b) upon a motion for new trial of questions of fact tried by a jury (in which cases costs must be awarded according to those directions).

2. When a question of fact has been tried by a jury. In such a case, unless an appellate court has given special directions, costs must be allowed to the successful party.

3. When there is a controversy over the probate of a will. The surrogate is prohibited in such a case, from granting costs to unsuccessful contestants, save for certain specified exceptions.

Section 2560 declares that the costs of an appeal, where they are awarded by the surrogate, shall be the same as if they were awarded in the supreme court.

These two sections (2558 and 2560) when compared with section 2589, which will be presently quoted, ['] and when the policy of the law as it was clearly settled before the enactment of the Code is taken into consideration, will be found to demand a narrower interpretation than that which the present applicant seeks to put upon them. While they provide, among other things, for the adjustment in surrogate's decrees of costs in appeal proceedings, it is not their intention, as it seems to me, to give to the surrogate any power to *award* such costs, in the strict sense of that term; in other words, they do not aim to enlarge the scope of his authority so as to enable him to *adjudge* that costs be paid when the court above has refused to award them or given no direction whatever—they are simply designed to establish the mode whereby the surrogate is enabled to exercise in respect to costs on appeal such limited authority as is conferred upon him by other provisions of law.

The two sections which are the immediate subject

Estate of Hewitt.

of discussion, form a part of article 3 of title 2 of chapter 18 of the Code. The chapter treats of "surrogate's courts and proceedings therein." The title is devoted to "provisions relating generally to the proceedings in surrogate's courts, and to appeals from those courts." The article is entitled, "Decrees and orders and the enforcement thereof. Costs and fees." The article which immediately follows treats solely of "*appeals*." This arrangement of topics is in thorough harmony with the view I have suggested, that sections 2558 and 2560 in the third article are intended to affect in no manner the question of the surrogate's right to [?] award costs on appeal, but only to provide for their insertion in a decree in cases where they may be lawfully awarded.

The correctness of this view becomes very apparent upon reference to section 2589, one of the sections of article 4, which, as has been stated already, is devoted solely to "*appeals*."

That section provides that the appellate court may award to the successful party the costs of an appeal, or may direct that costs shall abide the event of a new trial, or of subsequent proceedings in the surrogate's court. The section further declares that in either case, the costs may be made payable out of the estate or fund, or personally by the unsuccessful party, as directed by the appellate court, or, if such a direction is not given, as directed by the surrogate.

.This means, I take it, not that if an appellate court fails to award appeal costs, the surrogate is at liberty to award them, but that if an appellate court does award costs, and gives no direction whether the [?] same shall be paid out of the estate or fund, or by the unsuccessful party, the surrogate may exercise his discretion in the particulars wherein the appellate court has failed to exercise its own.

This construction of section 2589 is in strict har-

Stevens v. Webb.

mony with the interpretation I have put upon section 2558, and both sections are thus made accordant with the statutes in force before the Code was enacted, and with what must certainly be regarded as the most sensible procedure for regulating the award of costs on appeal.

Application denied.

STEVENS, ET AL., RESPONDENTS, v. WEBB,
APPELLANT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM,
JANUARY, 1883.

§ 531.

Bill of particulars.—Object of.—Not ordered where party applying for, knows what his adversary means to rely on.—Not ordered for the purpose of disclosing evidence.—Instance of an action of ejectment in which one should not be ordered.

The object of a bill of particulars, whether required of the plaintiff or of the defendant, is that the other party should not be taken by surprise from the generality of the pleadings.^[1] The effect of the bill, therefore, is to restrict the proof and limit the recovery or defense to what is stated in it unless the variance between it and the proof offered could not have misled the other.^[2, 3]

If a party fully knows what his adversary means to rely on for his cause of action or defense, he is not entitled to a bill of particulars.^[3, 4]

A bill of particulars is neither given or required for the purpose of disclosing to an adverse party the case relied upon, nor the proof to substantiate the same.^[1, 5] Its entire scope and nature is to furnish information to an opponent and to the court, of the specific proposition for which the party contends.^[3]

Where, in an action of ejectment, a bill of particulars was ordered of a paragraph of the answer wherein the defendant alleged that more than forty years prior to the commencement of the action, the

Stevens v. Webb.

boundary or division lines between the lands of the plaintiffs' ancestors and predecessors in title, and the land of the defendant's remote grantors were by all the parties in interest practically located and adjusted, and that for more than twenty years thereafter all parties interested therein or affected thereby acquiesced in such practical location, and it appeared from the affidavits on which the order was granted that, in a former litigation in which a similar defense was interposed in respect to property in the vicinity of that involved in the present action, proof was offered by counsel for the defendant in this suit of the existence of four distinct boundary lines of the plaintiffs' land, which it was contended had all been practically located, and that the plaintiffs' counsel was of counsel for the plaintiffs in such former litigation,—*Held*, on appeal from the order requiring the bill of particulars, that, while there was no doubt of the power of the court to order such a bill of particulars, the plaintiffs' attorney, having knowledge of the particulars desired, it should not have been ordered;[¹,⁴] that the particulars sought are matters of evidence,[²] and the order appealed from should be reversed.[¹⁰]

Higenbotham v. Green (25 *Hun*, 216), followed.[³]
(*Decided March 15*, 1883.)

Appeal from an order of the special term requiring the defendant to furnish "a bill of particulars of the matters averred in the sixth paragraph of his answer."

The action is ejectment, to recover possession of certain real estate, situate at the south-westerly corner of Fourth avenue and Seventy-eighth street in the city of New York.

The complaint alleges that the plaintiffs are the legal owners, and the defendant is wrongfully in possession thereof.

The answer admits the possession of the defendant, but denies the plaintiffs' title. It then avers as a third affirmative defense (in the sixth paragraph): "That, as he (the defendant) is informed and believes to be true, more than twenty years, and more than forty years prior to the commencement of this action, the boundary or division lines, between the lands of the

Stevens v. Webb.

plaintiffs' ancestors and predecessors in title, and the lands of this defendant's remote grantors, the mayor, aldermen, and commonalty of the city of New York, were by all the parties in interest practically located and adjusted, so as to exclude from the lands of the ancestors and predecessors of the plaintiffs, and to include within the lands of the mayor, aldermen, and commonalty of the city of New York, all of the premises, which this action is brought to recover, and for more than twenty years thereafter, all parties interested therein or affected thereby acquiesced in such practical location, which has been never disturbed."

Further facts are stated in the opinion.

Franklin A. Paddock, and *Francis L. Stetson* (*Paddock & Cannon*, attorneys), for appellant.

Though the court undoubtedly has power to order a bill of particulars in such a case as the present, it is a power which should be exercised only in its wise discretion, and rarely in such a case as this. *Orvis v. Dana*, 1 *Abb. N. C.* 268 If the information is in the possession of the party asking it, then it will be plain that the application is stimulated by some motive other than a desire for specific details. *Wigand v. Dejonge*, 18 *Hun*, 405. . . . The office of a bill of particulars is to limit the generality of the claim or defense, and is not to furnish evidence for the opposite party. *Gee v. Chase Mfg. Co.*, 12 *Hun*, 630. Neither is it to disclose to the opposite party the evidence upon which the party from whom it is demanded expects to rely. *Strong v. Strong*, 1 *Abb. Pr. N. S.* 238; *Orvis v. Dana*, 1 *Abb. N. C.* 268-286. . . . It rests in discretion, however, and in this case its exercise was not in the line of wisdom. *Higenbotham v. Green*, 25 *Hun*, 214. The power to order a bill of particulars should be prudently employed, with the view to enable parties to prepare

Stevens v. Webb.

their pleadings or evidence for the trial of the real issues involved in an action, and not to impose unnecessary labor upon any party. *Butler v. Mann*, 4 *Abb. N. C.* 49.

Morris A. Tyng (*T. M. Tyng*, attorney), for respondents.

The court at special term had undoubted power to make the order appealed from. *Code of Civil Pro.* § 531. The court may in all cases order a bill of particulars of the claim of either party to be delivered to the adverse party. *Tilton v. Beecher*, 59 *N. Y.* 176. The word claim in this section includes, in case of a defendant, whatever is set up by him based upon facts alleged as the reason why judgment should not go against him. *Dwight v. Germania Life Ins. Co.*, 84 *N. Y.* 493; *Orvis v. Dana*, 1 *Abb. N. C.* 268. . . .

The special term having discretion to make or refuse to make the order appealed from, the only question left on this appeal is, whether that discretion has been so abused as to require the order to be reversed by the general term. The question is not whether, as an original application, this court would, in the exercise of its discretion, grant the same order. *Bryan v. Durrie*, 6 *Abb. N. C.* 135, 139, citing with approval, 1 *Wait's Pr.* 465.

The court does not encourage appeals upon mere matters of discretion, and it will only interfere when the discretion seems to have been abused, or in a plain case of its unwise exercise. *Morrison v. Agate*, 20 *Hun*, 23, 25. . . . Appeals from such orders "were designed to redress wrongs arising from an erroneous, arbitrary, or otherwise improper exercise of discretion." *Matter of Duff*, 10 *Abb. Pr. N. S.* 416. . . . In actions of ejectment it has always been the practice in this state to give a bill of particulars at any time before trial. *Vischer v. Conant*, 4 *Cow.* 396, [approved] *Tilton v. Beecher*, 59 *N. Y.* 184.

Stevens v. Webb.

DALY, Ch. J.—There is no doubt as to the power of the judge at special term to make such an order as ['] the one appealed from. (*Dwight v. Germania Life Ins. Co.*, 84 *N. Y.* 493; *Orvis v. Dana*, 1 *Abb. N. C.* 268; *Tilton v. Beecher*, 59 *N. Y.* 176.) In fact, it has been specifically held in an action of ejectment, that a bill of particulars of the claim of the plaintiff or of the defendant, in respect to the land, may be ordered (*Doe ex dem. Webb v. Hull*, and *Doe ex dem. Saunders v. Duke of Newcastle*, 7 *T. R.* 332, Note A).

The only question, therefore, on the appeal, is whether, upon the facts disclosed by the affidavit, the order should have been granted.

The object of the bill of particulars, whether required of the plaintiff or of the defendant, is that ['] the other party should not be taken by surprise from the generality of the pleadings, and come to the trial unprepared as to the nature of the claim made by the plaintiff, or the nature of the defense set up to it; and the effect of the bill, therefore, is to restrict the proof, and limit the recovery or defense to what is stated in it, unless the variance between it and the proof offered, could not have misled the other party (*Mc Nair v. Gilbert*, 3 *Wend.* 346; *Brown v. Williams*, 7 *Cow.* 316; *Bowman v. Earl*, 3 *Duer* 691; *Hurst v. Watkins*, 1 *Campb.* [*Eng. N. P. R.*] 69; *Graham's Practice* [Edition of 1836], 514-518). But if a party fully knows

what his adversary means to rely on for his cause ['] of action or defense, he is not entitled to a bill of particulars of it (*Willis v. Wiley*, 19 *Johns.* 268; *Wigand v. Dejonge*, 18 *Hun.* 405), and this was the case here. The affidavit upon which the order to show cause was granted, was made by the plaintiff's attorney, in which he stated that in a former litigation, in which a similar defense was interposed in respect to the property in the vicinity of that involved in this suit, proof was offered by the counsel for the defendant in the

Stevens v. Webb.

present suit, of the existence of four distinct existing boundary lines of the plaintiffs' land ; that it was then contended that they had all been practically located ; that three of the plaintiffs' predecessors, at intervals of many years, had located and adjusted them ; and that the present counsel for the plaintiff in this action was fully informed of the matters of defense for which he now applies for the particulars, appears more fully in the affidavits in opposition to the motion, in which it is stated that in three previous trials, the questions and facts presented by the defense in this action, had been the subject of direct investigation ; that the plaintiffs' attorney was counsel in those actions, and that it is the belief of the defendant's counsel that there is not and cannot be any evidence introduced on the trial of the present action, other than that embraced in the former actions, and of which he believes the defendant's counsel is as fully informed as any living person.

The plaintiffs' attorney, upon this appeal, calls our attention to the fact that this does not charge that the plaintiffs know anything, but refers only to the knowledge possessed by the plaintiff's attorney, a distinction which, upon a motion of this nature, made by the plaintiffs' attorney and upon his affidavit, we do not appreciate.

The object of the motion is not to obtain information in respect to what lines the defendant refers to in the sixth paragraph of his answer, as having been practically located and adjusted as the boundary lines between the lands of the plaintiffs' ancestors or predecessors and the lands of the corporation of the city of New York, but as expressed in the moving affidavit, to confine the defendant upon the trial to some one or the other of these four lines, and compel him to declare by whom he will claim on the trial that such a line was located.

I see no reason why the defendant should be com-

Stevens v. Webb.

pelled as expressed in the order to show cause, to
['] state what lines and upon what position upon the
soil they are, or by what ancestor or predecessor he
expects to prove that such lines were so located or
adjusted, and at what time he claims or expects to
prove that they were so located and adjusted.

The plaintiff is fully apprised, through the knowl-
edge which he already has of the exact nature of the
defense which the defendant means to set up to this
action, it being the same as set up by him in former
actions, and I see no reason why he should be limited
to any one of the particular lines assumed by him to
have been adjusted and located.

The reason why the party is restricted in his proof
by being limited in his recovery or defense to what
['] is stated in the bill of particulars, is because he has
the right to assume that his adversary has set out
fully what he means to rely on for his cause of action
or defense, and he should not be allowed to mislead or
deceive the other party by setting up one thing and
proving another, or by giving a particular account of
the nature of this claim or defense and then proving
something different. Although the complaint or
answer contains all that is required in a pleading, it
may be deficient in the necessary information for the
other party's guidance, which information he is not
presumed to know; but if he does know, why should
the other party be required to furnish him with
['] particulars of which he is already fully apprised?

While full information should be furnished of the
nature of the cause of action or of the nature of the
defense that is set up to it, the court must not, in the
case of a defendant, overlook what has been frequently
reiterated on applications of this kind for bills of par-
ticulars, that he is not bound to disclose the evidence
upon which he relies to establish his defense; that
['] it is sufficient if it clearly appears what the nature

Stevens v. Webb.

of his defense is, and if upon the statement made of it, his adversary and the court can see, upon the trial, what evidence is or is not relevant to prove it, it is enough.

As was said in the case of *Higenbotham v. Green* (25 *Hun*, 216), a bill of particulars "is neither ["] given nor required for the purpose of disclosing to an adverse party the case relied upon, nor the proof to substantiate the same. Its entire scope and nature, is to furnish information to an opponent and to the court of the specific proposition for which the party contends."

The defense set up by the sixth paragraph of the answer, is that more than forty years before the commencement of the suit, the boundary or division lines between the plaintiffs' ancestors and the corporation of the City of New York, were by all the parties in interest practically located and adjusted so as to exclude from the lands of the said corporation the premises which are described by metes and bounds in the twelfth paragraph of the complaint, and are premises which the defendant holds under claim of title from the said corporation, and to recover which from the defendant, the plaintiffs have brought this action of ejectment. How the boundary or division lines were so located as to exclude the lands of the plaintiffs' ancestors and include in the lands of the corporation of the city of New York, the premises which the defendant and his grantor have had possession of for more than forty years under a claim of a title, is matter of ["] evidence. The defendant is not required to declare to his adversary the evidence by which he expects to prove the fact upon which he relies as his defense, in addition to which, the plaintiff's attorney knows fully what that evidence is; and the reason which he gives in his affidavit why the defendant should be restricted, through the instrumentality of a bill of particulars, to some one or other of the four lines of which

Stevens v. Webb.

the defendant gave proof in the preceding actions, is that if the defendant is not so confined, it will require an extensive preparation on the part of the plaintiffs of a large amount of irrelevant testimony.

The inconvenience or trouble to which the plaintiff may be put in proving his case, is no reason why the defendant should be limited in his defense to proof of the locating or adjusting of one line. For all that the court can know, it may be very material upon a question of boundaries, for the defendant, in establishing his defense, to show the location of four lines. The respondents suggest, that the order does not limit the defendant to the proof of one line, or impose any limitation; that it is simply in general terms, that a bill of particulars be furnished, of the matters averred in the sixth paragraph.

Where an order, made upon a motion of this kind is simply in general terms, that a bill of particulars be furnished, it naturally will be interpreted in connection with what was asked for in the order to show cause; and the party furnishing it would be expected to set forth the specific information that has been applied for; and the defendant, upon complying with the order, would be restricted to the particulars set forth by him in the bill. But if such is not its effect—if it would not, as the plaintiff expected and desired—limit the defendant to one or other of the four lines, then there was no object in granting it, as the plaintiff is already possessed of all the information that would be contained in it.

For these reasons, the order, in my opinion ["] should be reversed, with costs to abide the event.

VAN BRUNT and J. F. DALY, JJ., concurred.

Dalton v. Sandland.

DALTON, APPELLANT, v. SANDLAND.

DAVENPORT, AS EXECUTOR, ETC., RESPONDENT.

CITY COURT OF BROOKLYN, GENERAL TERM,
MAY, 1883.

§§ 755, 757.

Continuing action.—When action did not abate by the death of the defendant, both parties have an absolute right to a continuance.—

The presenting of a claim to an executor and agreeing to refer it, without naming a referee, does not bar the continuance against such executor of an action on said claim begun against his decedent before his death.

Where the defendant, in an action to recover \$1,000 on two promissory notes made by him, died, and the plaintiff in the action thereafter presented his claim on such notes to his executor and signed a consent to refer it, in which no referee was named, and which was not approved by the surrogate,—*Held*, on a motion by plaintiff to continue the action against the executor, that the action did not abate by the death of the executor, and both parties had an absolute right to a continuance; that the presentation of the claim and consent to refer did not amount to the commencement of another action; that it was necessary that the parties agree on a referee to be approved by the surrogate; that if no suit had been pending at the time of the death of the defendant would have had a right to bring an action against the executor for the claim, notwithstanding the presentation of the claim and agreement to refer, no referee having been agreed upon, and that such presentation of the claim and agreement to refer would not bar the continuance of an action which has not abated.

(Decided September 9, 1883.)

Appeal from order of special term denying motion to revive and continue action against the executor of the defendant, deceased.

This action was brought by the plaintiff to recover \$1000 due on two promissory notes, made by the

Dalton v. Sandland.

defendant and indorsed to the plaintiff. The summons and complaint were served on April 26, 1882, and the defendant having failed to appear or answer, judgment was entered against her on May 23, 1882, for the amount claimed, with interest and costs. After the service of the summons and complaint, and before the entry of judgment, the defendant died. She left a will whereby she nominated John S. Davenport executor. The will was thereafter, and in October 1882, admitted to probate by the surrogate of Kings county, and letters testamentary were issued thereon. In view of those facts a motion was made at special term, on behalf of the plaintiff, for an order vacating the judgment so taken by default, and for leave to revive or continue the action against the executor of the deceased defendant.

On the motion, the executor's counsel proved by affidavits, that the plaintiff and the executor had signed a written consent to refer the claims which were the subject of the action to a referee, under the statute. It appeared, however, that no referee had been agreed upon by them, or approved by the surrogate. The executor's counsel claimed, that the plaintiff, by consenting to the reference under the statute, had waived his right to have the action revived and continued against the defendant's executor. The special term (REYNOLDS, J.) took that view, and made an order vacating the judgment above referred to, discontinuing the action, and denying plaintiff's motion to revive and continue.

This appeal was taken from so much of that order as discontinued the action and denied the motion to revive.

Morris & Pearsall, for the appellant.

The plaintiff was and is entitled as a matter of absolute right, on the death of defendant, on the motion made, to an order reviving and continuing this action

Dalton v. Sandland.

against defendant's executor. *Code Civ. Pro.* § 757; *Coit v. Campbell*, 82 *N. Y.* 509. . . . The plaintiff could not be divested of that right to revive and continue the action, by presenting his claim to the executor of defendant, and consenting to refer under the statute. *Code Civ. Pro.* § 755. . . . The presentment of the claim to the defendant's executor, and the consent to refer . . . could not even amount to a defense, for, in the first place, proceedings under the statute were not thereby instituted (*Comstock v. Olmstead*, 6 *How. Pr.* 77), and in the second place, if such proceedings had been instituted by order of reference, it could not affect this action, as the defense of another action pending can only be set up as to the pendency of prior actions or proceedings. *Hadden v. St. Louis, &c. R. R. Co.*, 57 *How. Pr.* 390; *Porter v. Kingsbury*, 77 *N. Y.* 164; *Burlingame v. Parce*, 12 *Hun*, 149.

Felix Jellenik, for respondent.

CLEMENT, J.—This action did not abate by the death of the defendant,* and both parties had an absolute right to a continuance. (*Code Civ. Pro.* §§ 755, 757.) The presentation of the claim, and the consent to refer, did not amount to the commencement of another action. It was necessary that the parties agree on a referee† to be approved by the surrogate.‡ If no suit

* See *Concord Granite Co. v. French*, 8 *N. Y. Civ. Pro.* 56, 445.

† 2 *R. S.* 89, § 36, as amended by *Laws of 1859*, Ch. 216 § 3; *R. S.* (Banks' 7 ed.) 2299, § 36. See also *Gorman v. Ripley*, 16 *How. Pr.* 314; *Estate of Jackson*, *N. Y. Daily Reg.*, April 20, 1888.

‡ The agreement to refer must be approved by the surrogate and filed with his approval in the office of the clerk of the supreme court, in the county where either of the parties reside, and an order referring the claim to the parties agreed upon, entered by such clerk. 2 *R. S.* 89, § 36, as amended by *Laws of 1859*, ch. 261; 3 *R. S.* (Banks' 7 ed.) 2299, § 36; *Comstock v. Olmstead*, 6 *How. Pr.* 77; *Robert v. Ditman*, 7 *Wend.* 522.

McNarmara v. Harris.

had been pending at the time of the death of the defendant, plaintiff would have a right to bring an action against the executor for the claim, notwithstanding the presentation of the claim and an agreement to refer, no referee having been agreed upon. If a new action would lie, certainly the acts claimed to have been a waiver, would not bar the continuance of an action which had not abated.

The order appealed from should be reversed with ten dollars costs and disbursements, and the motion granted without costs.

McCUE, J., concurred.

McNAMARA v. HARRIS.

CITY COURT OF NEW YORK, SPECIAL TERM,
AUGUST, 1883.

§§ 756, 3268.

Continuing action.—In case of transfer of interest, an action may be continued by the original party.—The granting of an order substituting the person to whom the interest was transferred in place of the original party, is in the discretion of the court.

—Such an order should not be granted where the practical effect would be to defeat the legal consequences of an order requiring security for costs to be given.

In case of a transfer of interest, after the commencement of an action, the original party may continue the action unless the court directs that the person to whom the interest is transferred be substituted in the action. An order directing such substitution is usually granted, but it is discretionary, and the court may withhold it if there are any reasons why it should not be made.

Where a non-resident plaintiff sold and transferred a note upon which

McNamara v. Harris.

the action was brought, to one who was a resident, after a motion that he be required to give security for costs was noticed, and three days before it was granted,—*Held*, that a motion to substitute the transferee in the place of the original plaintiff should be denied; that the assignment was subject to the then pending application for security for costs, and the order requiring it could not be defeated nor impaired by such transfer;* that the practical effect of granting the application to substitute the transferee as plaintiff, would be to defeat the legal consequences of the order for security for costs, and that could not be done.

[*Decided August 8, 1888.*]

Motion by one Mitchell, to whom plaintiff had transferred his cause of action, to be substituted in his place.

The action was brought to recover upon a promissory note. The defendant noticed a motion for an order that the plaintiff be required to give security for costs on the ground that he was a non-resident of the city and county of New York. Subsequently and three days before the order requiring the plaintiff to give securities for costs was granted, he sold and transferred the note in suit to one Mitchell, a resident of the city, who thereafter made this motion.

Norris & Beach, for the motion.

F. O. Swain, opposed.

MCADAM, J.—The Code (§ 756) provides that, “In case of a transfer of interest . . . the action may be continued by . . . the original party; unless the court directs the person to whom the interest is transferred . . . to be substituted in the action.” The order is a discretionary one usually granted, but which the court may withhold if there are any reasons why it

* See Note on Security for Costs, post, p. 82.

McNamara v. Harris.

should not be made. When Mitchell purchased the note it was in suit. An application was pending to require security for costs from the plaintiff in the action. The application for security was granted three days after the transfer was made. The assignment was therefore subject to the then pending application, which was subsequently granted, and the order made requiring security for costs cannot be defeated nor impaired by such a transfer. The practical effect of granting the present application, would be to defeat the legal consequences of that order, and this cannot be done. It follows that the application to substitute Mitchell in the place of the non-resident plaintiff must be denied. Mitchell may prosecute the present action by giving the security already required to be filed, or he may discontinue the action upon payment of the costs already incurred, and commence a new action in his own name. This course will not disturb any of the proceedings already had, and secures to the several parties their respective rights under the various provisions of the Code.

Bostwick v. Fifield.

BOSTWICK v. FIFIELD.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM,
MAY, 1882.

§§ 3268, *subd.* 1, 3343, *subd.* 1.

Security for costs.—The New York court of common pleas belongs to the class denominated “superior city courts.”—It is a county court for certain purposes, but not within the meaning of section 3268 of the Code of Civil Procedure.—A plaintiff cannot be required to give security for costs in the New York court of common pleas, because he is a non-resident of the county.

The county court referred to in section 3268 of the Code of Civil Procedure, which provides for the giving of security for costs, does not mean the court of common pleas for the city and county of New York which belongs, under the Code, to the class denominated “superior city courts,” and is a county court for certain purposes. The county court meant in section 3268 is the “county court in each county, except New York.”

The plaintiff, in an action in the New York court of common pleas who resides without the county of New York but within the state, cannot be required to file security for costs under the first subdivision of section 3268 of the Code of Civil Procedure.

Motion by defendant for an order requiring the plaintiff to give security for costs.

The plaintiff at the time of the commencement of the action, and at the time of the making of the motion, resided in Brooklyn, Kings county. The defendant claimed that the plaintiff, not being a resident of the county of New York, should give security for costs, under subdivision one of section 3268 of the Code of Civil Procedure.

Ryan v. Potter.

William H. Tilton, for the motion.

Harman B. Whitbeck, opposed.

DALY, Ch. J.—This motion is to compel the plaintiff, who resides in Brooklyn, to file a security for costs, under section 3268 of the Code. It must be denied.

The county court referred to in that section does not mean this court, which belongs, under the Code, to the class denominated "superior city courts" (§ 3343 subd. 1), and the county court meant in section 3268 is, in the language of the Code, the "county court in each county except New York." (§ 2, subds. 6 and 13.)

This court is a county court for certain purposes, but is not the county court referred to in section 3268.

RYAN, AS ADMINISTRATOR, ETC., v. POTTER.

N. Y. SUPERIOR COURT, SPECIAL TERM, JUNE, 1882.

§§ 3268, 3271.

Security for costs.—In a case within section 3268 of the Code, defendant's right to, is absolute, unless lost by laches.—Under section 3271 the court may, in its discretion, require plaintiff to give security for costs.—Not required in action by administrator, simply because the only asset of the estate is the claim in suit.

- . A defendant has an absolute right to require the plaintiff to give security for costs, in a case within section 3268 of the Code of Civil Procedure, unless he has lost such right by his own laches. Under section 3271 of the Code of Civil Procedure the court may, in its discretion, require the plaintiff to give security for costs.

The court should not require an administrator who has brought and is prosecuting an action in good faith, to give security for costs therein, simply because he is the administrator of an estate that has no funds except the claim in suit.

Ryan v. Potter.

Motion by defendant that the plaintiff be required to give security for costs.

The plaintiff brought this action as administrator of one Ryan to recover \$5,000 damages for the alleged negligence of the defendant in and about the construction, care and management of a certain building in the city of New York owned by him, whereby it took fire and was destroyed, by which fire the plaintiff's intestate's death was caused.

It appeared that the deceased left no property of any kind, and that the only asset of the estate was the claim in suit. There was, however, nothing to show bad faith on the part of the plaintiff in bringing or prosecuting the action.

Townsend, Dyett, & Einstein, for the motion.

Charles A. Hess, opposed.

TRUAX, J.—In a case within section 3268 of the Code of Civil Procedure, the defendant has an absolute right to require the plaintiff to give security for costs, unless such right has been lost by the defendant's laches; but under section 3271, the court may, in its discretion, require the plaintiff to give such security. If an action is brought and prosecuted in good faith by an administrator, the court should not require him to file security for costs, simply because he is the administrator of an estate that has no funds except the claim in litigation. See *Healy v. Twenty-third Street R. R. Co.*, 1 *N. Y. Civ. Pro.* 15; and cases there cited.

Motion denied with \$10 costs to abide the event.

 Note on Security for Costs.

NOTE ON SECURITY FOR COSTS.

When right to require security absolute.—Laches.—Who must give.—The application and order.—The security.—Excepting to and justification of sureties.—Additional security.—Effect of failure to give security when ordered.—Liability of attorney.

The provisions of the Code of Civil Procedure (§§ 3268, 3269) on this subject are founded upon the Revised Statutes (2 R. S. 620, 621); section 317 of the Code of Procedure, and chapter 805 of the Laws of 1875, and, therefore, many of the decisions under the former statutes are applicable to the Code. Where the provisions of the present Code and those of the statutes it takes the place of, are similar, decisions under both are cited. Where they differ substantially, those cases only which were decided under the Code are referred to.

When right to require, absolute: when discretionary: laches. In the cases mentioned in sections 3268 and 3269 of the Code of Civil Procedure, the defendant may require security for costs as a matter of absolute right. *N. Y. Com. Pleas, S. T. Feb. 1881, Healy v. Twenty-third St. Ry. Co., 1 N. Y. Civ. Pro. 15; N. Y. Mar. S. T., May, 1882, Kleinpeter v. Enell, 2 Id. 21; Sup. (2 Dept.) G. T., Jan. 1883, Buckley v. Gutta Percha & Rubber Mfg. Co., 3 Id. 428; N. Y. Super. S. T., June, 1882; Ryan v. Potter, ante, p. 80.*

When, in one of those cases, the defendant requires security for costs, the court has no discretion, but it or a judge thereof *must* make an order requiring the plaintiff to give security. Code, § 3272; *N. Y. Super. S. T., Jan. 1881, Merelith v. Forty-second St. and Grand St. R. R. Co., 1 N. Y. Civ. Pro. 15, note; Sup. (2 Dept.) G. T., Jan. 1883, Buckley v. Gutta Percha & Rubber Mfg. Co., 3 Id. 428.* But whenever the application therefor has been unusually delayed the granting of it rests in the sound discretion of the judge or court. *Fearn v. Gelpcke, 13 Abb. Pr. 478; Boucher v. Pia, 14 Id. 1.*

The defendant's right to require security for costs may be lost by laches. *N. Y. Com. Pleas, S. T. Feb. 1881, Healy v. Twenty-third St. Ry. Co., 1 N. Y. Civ. Pro. 15; N. Y. Super. S. T., Feb. 1883, Boylan v. Mathews, 3 Id. 38; Webber v. Moog, 12 Abb. N. C. 108; Shuttleworth v. Dunlop, 25 Alb. L. J. 8.*

The provisions of section 3268 of the Code, are intended solely for the benefit of the defendant, and his neglect to promptly avail himself of such benefit would be construed as a waiver. *Sup. (2 Dept.) G. T., Jan. 1883, Buckley v. Gutta Percha & Rubber Mfg. Co., 3 N. Y. Civ. Pro. 428; Wice v. Commercial Fire Ins. Co., 2 Abb. N. C. 325; and*

Note on Security for Costs.

see as to waiver of benefit not conferred for common good of parties, cases cited in note, 1 *N. Y. Civ. Pro.* 17.

The defendant has been held to have lost his right to require security for costs where, before moving therefor he had answered (*May v. Power*, 2 *Edw.* 294; *Webber v. Moog*, 12 *Abb. N. C.* 108); appeared and obtained an extension of his time to answer, stipulated to accept short notice of trial, and answered (*Buckley v. Gutta Percha & Rubber Mfg. Co.*, *supra*); where he had examined the plaintiff before trial, and the case had been called on the calendar and marked ready for trial (*Boylan v. Mathews*, *supra*); where he did not demand it, until seven months after issue joined on the day fixed for trial (*Robinson v. Sinclair*, 1 *Denio*, 628); where he waited two years with knowledge of plaintiff's non-residence (*Weil v. Freund*, 2 *Law Bul.* 48); where the cause had been several times noticed for trial (*Swan v. Mathews*, 3 *Duer*, 613); where he had waited with knowledge of plaintiff's non-residence, for nearly a year, and the cause had been noticed for trial (*Lewis v. Farrel*, 46 *Super.* [14 *J. & S.*] 358); where it had been referred, and noticed for hearing (*Florence v. Buckley*, 1 *Duer*, 705; *S. C.*, 12 *N. Y. Leg. Obs.* 28); where he did not move until after a verdict had been rendered in his favor (*Jackson v. Bushnell*, 13 *Johns.* 380); where an interlocutory judgment had been entered (10 *How. Pr.* 313); where judgment had been rendered against him (*Gardner v. Kelly*, 2 *Sandf.* 632; *Merchants' Bank v. Mills*, 8 *E. D. Smith*, 210; *Wice v. Com. Ins. Co.*, 7 *Dalj.* 258); where there had been unreasonable delay in moving, and the plaintiff's attorney was unable to communicate with the plaintiff by reason of an insurrection (*Fearn v. Gelpcke*, 18 *Abb. Pr.* 473).

In *Burgess v. Gregory* (1 *Edw.* 449); *Abbott v. Smith* (8 *How. Pr.* 463); *Butler v. Wood* (10 *Id.* 313), it was held that security for costs might be required, at any time before judgment; and in *Gedney v. Purdy* (47 *N. Y.* 676), that it might be required at any time during the pendency of the action, either before trial or pending an appeal. In *Steam Navigation Co. v. Weed* (8 *How. Pr.* 49); *Renney v. Stringer* (4 *Bow.* 663); *Northrup v. Wright* (1 *How. Pr.* 146), it was held that security for costs might be ordered after the decision of an appeal, on which a new trial was ordered. In *People v. Oneida Common Pleas* (18 *Wend.* 652), it was held that delay in taking steps on the part of the defendant, with knowledge, was not in this State any reason for refusing to require the plaintiff or relator, who removes from the State to give security for costs, but in *Goodrich v. Pendelton* (8 *Johns. Ch.* 520), it was held that where the non-residence of the plaintiff appears on the bill, if the defendant takes any step in the cause he waives security for costs; and in *Long v. Majestic* (1 *Johns. Ch.* 202), it was held that if the fact does not appear, the defendant must then

Note on Security for Costs.

apply as soon as the fact comes to his knowledge, in any stage of the suit.

Where the defendant ascertained at the trial of the cause, that the plaintiff was a non-resident, and he moved for security for costs on the third day thereafter, *Held*, that laches could not be imputed to him. *Boucher v. Pia*, 14 *Abb. Pr.* 1.

Appearing in the suit, opposing the appointment of a receiver, and demurring to the bill, were held in *Micklethwait v. Rhodes* (4 *Sandf. Ch.* 484), not to preclude a defendant from applying for security for costs.

Although a defendant has waived his right to require security for costs, the court still has the power to require it. *Hayes v. Second Ave. R. R. Co.*, here reported.

HAYES, AN INFANT, BY HAYES, HIS GUARDIAN AD LITEM, v. THE SECOND AVENUE RAILROAD COMPANY.

N. Y. SUPERIOR COURT, SPECIAL TERM, CHAMBERS, OCTOBER, 1883.

§ 3268.

Security for costs—When absolute right to, forfeited by laches court may still require.

Where a defendant has forfeited his right to require security for costs under section 3268 of the Code of Civil Procedure, the court in its discretion still has the power to order the plaintiff to give it. (*Decided October 10, 1883.*)

Motion by defendant for an order that the plaintiff, an infant suing by his guardian *ad litem*, give security for costs.

The action was commenced June 19, 1883, and issue joined August 18, 1883. The notice of motion was dated August 25, 1883, but was not served until September 24, 1883. From affidavits used on the motion it appeared that one of the defendant's attorneys who had special charge of the defense was absent from the city on his vacation from shortly after the action was commenced until August 31.

Further facts are stated in the opinion.

Hutchins & Platt, for the motion.

Hugh Coleman, opposed.

O'GORMAN, J.—There are circumstances in this case which go far to excuse the defendant's delay in moving for security for costs, viz., the absence of the attorney having special charge of the defense on vacation; the pendency of a negotiation for settlement of the action, with the understanding—claimed by the defendant's attorneys to exist—that during said negotiation no steps to obtain security should be made. Even if the strict right to security under section 3268 of the Code has been

Note on Security for Costs.

forfeited by laches, the court in its discretion has still the power to require security.

Motion granted, without costs.

Under section 8271 of the Code of Civil Procedure, the court may in discretion, require the plaintiff to give security for costs in an action by or against an executor or administrator in his representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue or be sued, or by an official assignee, the assignee of a receiver, or the committee of a person judicially declared to be incompetent to manage his affairs.

The exercise of this power is in the discretion of the court. *Healy v. Twenty-third St. Ry. Co.*, 1 *N. Y. Civ. Pro.* 15; *Ryan v. Potter*, *ante*, 81. The power is discretionary in the fullest sense of the term. *Darby v. Condit*, 1 *Duer*, 599; *Shepherd v. Burt*, 3 *Id.* 645.

Who must give, and when. Security for cost can be required only in courts of record. *Code Civ. Pro.* §§ 8268, 8269; *Southworth v. Straight*, 4 *N. Y. Leg. Obs.* 19; *Westervelt v. Gregg*, 1 *Barb. Ch.* 469; *Mellen v. Hutchins*, 58 *How. Pr.* 349. A justice of the peace has no authority to order it. *Id.*

The provisions of the Code relating to security for costs "apply to a special proceeding instituted in a court of record in like manner as to an action; for which purpose the prosecuting party other than the people, or, where the special proceeding is instituted in the name of the people upon the relation of a private corporation or individual, the relator, is deemed a plaintiff, and the adverse party a defendant." *Code*, § 8279. Security for costs cannot be required in summary proceedings to recover real property. They are brought before an officer, and are not in a court of record. *Hasler v. Johnston*, 59 *How. Pr.* 482. Security may be required in an action for tort as well as in an action on contract. *Keller v. Townsend*, 3 *Abb. N. C.* 482.

Before the Code of Civil Procedure it was held that where it appears that the defendant cannot have costs in the action, a motion for security for costs should be denied. *Abbott v. Smith*, 8 *How. Pr.* 463; *Butler v. Wood*, 10 *Id.* 813.

It is not necessary to make a case within the words of the statute, for the power to require security for costs is inherent in the court. *Swift v. Collins*, 1 *Denio*, 659; *People v. Oneida Common Pleas*, 18 *Wend.* 652; *Dyer v. Dunnevan*, 3 *How. Pr.* 135.

The giving of the undertaking required on replevying a chattel (*Code*, § 1699) in an action to recover a chattel is not sufficient security for costs in a case in which the defendant is entitled to it, and the plaintiff may, notwithstanding, be required to give security for costs. *Rogers v. Hitchcock*, 9 *Wend.* 462; *Gelch v. Barnaby*, 1 *Bow.* 657;

Note on Security for Costs.

S. C., 7 *Abb. Pr.* 19; *Boucher v. Pia*, 14 *Id.* 1. See also *Hodges v. Porter*, 19 *How. Pr.* 244. *Contra*, *Wisconsin Marine & Fire Ins. Co. v. Hobbs*, 22 *How. Pr.* 494; *Dopy v. Brown*, 1 *How. Pr.* 245.

The undertaking given on procuring an injunction does not affect defendant's right to security for costs. *McCall v. Frith*, 2 *N. Y. Civ. Pro.* 9.

Security should not be required where the plaintiff has already filed an undertaking to pay all costs which may be awarded to the defendant in case he recovers judgment. *N. Y. Com. Pleas Sp. T.*, 1871, *Woodward v. Stearns*, 11 *Abb. Pr. N. S.* 445.

After being ordered to file security for costs a plaintiff will not be permitted to prosecute *in forma pauperis*. *Florence v. Bulkley*, 1 *Duer*, 706; *Brown v. Story*, 1 *Paige*, 588; *Kleinpeter v. Enell*, 2 *N. Y. Civ. Pro.* 21; *Christian v. Geuge*, 3 *N. Y. Law Bul.* 42; S. C., 10 *Abb. N. O.* 82; *Anonymous*, *Id.* 80.

Where the practical effect of an order continuing an action in the name of a transferee of the original plaintiff will be to defeat an order requiring security for costs, it should not be granted. *McNamara v. Harris*, 4 *N. Y. Civ. Pro.* 76.

UNDER SECTIONS 3268, 3269. In a case specified in either of these sections, "if there are two or more plaintiffs, the defendant cannot require security for costs to be given, unless he is entitled to require it of all the plaintiffs." *Code*, § 3270.

Sections 3268 and 3269 of the Code do not apply to marine causes brought as prescribed in sections 3177 to 3187, inclusive, of the Code of Civil Procedure, in the City Court of New York, nor to actions in said court, wherein the time named in the summons within which the defendant must answer the complaint has been shortened on proof by affidavit "that either the plaintiff or the defendant resides without the city of New York;" or where there are two or more plaintiffs or two or more defendants, that all the "plaintiffs or all the defendants resides without that city," and an undertaking has been given "that the plaintiff will pay any judgment which may be rendered against him in the action not exceeding a sum specified in the undertaking, which must be at least two hundred dollars." *Code Civ. Pro.* §§ 3160, 3195.

Non-residents. A plaintiff who, at the time the action was commenced, resided without the State, or if the action is brought in a county court or in the city court of New York formerly known as the marine court of the city of New York, the city court of Yonkers, or the justice court of the city of Albany, residing without the city or county, as the case may be, wherein the court is located (*Code*, § 3298, subd. 1), also a plaintiff who after the action is commenced ceases to be a resident of the State, or, if the action is brought in one of the local courts men-

Note on Security for Costs.

tioned, who ceases to be a resident of the city or county as the case may be, wherein the court is located (Code, § 3268, subd. 1) may be required by the defendant to give security for costs.

Residence has been defined as a place of abode or dwelling-place as distinguished from a mere temporary locality of existence. *Roosevelt v. Kellogg*, 20 *Johns*. 208; and see *Frost v. Brisbin*, 19 *Wend.* 11; *Matter of Wrigley*, 8 *Id.* 134. A man's legal residence is his place of fixed habitation, where his political rights are exercised and where he is liable to taxation. *Crawford v. Wilson*, 4 *Barb.* 506; *Houghton v. Ault*, 16 *How. Pr.* 77; and see *Frost v. Brisbin*, 19 *Wend.* 11; *Matter of Hall*, 2 *N. Y. Leg. Obs.* 139. Ordinarily one's residence and domicil are the same (*Chaine v. Wilson*, 1 *Bow.* 675); but domicil means something more than residence; it includes residence with an intention to remain in a particular place. *Isham v. Gibbons*, 1 *Bradf.* 69; *Haggart v. Morgan*, 5 *N. Y.* 422; *Matter of Thompson*, 1 *Wend.* 43; *Frost v. Brisbin*, 19 *Id.* 11; *Hegeman v. Fox*, 31 *Barb.* 475. See also *Chaine v. Wilson* 8 *Abb. Pr.* 78; *S. C.*, 1 *Bow.* 675; *Matter of Roberts*, 8 *Paige*, 519.

No man can have two places of domicil for one and the same purpose at the same time (*Abington v. North Bridgewater*, 23 *Pick.* 170; *McDaniel v. King*, 5 *Cush.* 469); but his domicil may be in one State and his actual residence in another. *Frost v. Brisbin*, 19 *Wend.* 11. And see *Pooler v. Maples*, 1 *Id.* 65; *Bartlett v. City of N. Y.*, 5 *Sandf.* 44. The actual residence is not always the legal residence or inhabitancy of a man. *Crawford v. Wilson*, 4 *Barb.* 504. And see *Douglas v. Mayor*, 2 *Duer*, 110.

Where one has his home, as that term is ordinarily used and understood among men, and he habitually resorts to that place for comfort and rest, relaxation from the cares of business and restoration to health, and there abides in the intervals when business does not call; that is his residence, both in the common and legal meaning of the term. *Chaine v. Wilson*, 1 *Bow.* 675; *S. C.*, 8 *Abb. Pr.* 78; 16 *How. Pr.* 552.

A man's residence is that place where his family dwells, or which he makes the chief seat of his affairs and interests. *N. Y. C. P. Sp. T.* 1866, *Matter of Hawley*, 1 *Duly*, 531.

One does not become a resident of a place by coming thither from his home daily and there conducting business. *Burroughs v. Bloomer*, 5 *Denio*, 532; *Barry v. Bockover*, 6 *Abb. Pr.* 374; *Greaton v. Morgan*, 8 *Id.* 64; *Houghton v. Ault*, 16 *How. Pr.* 77; *Bache v. Lawrence*, 17 *Id.* 554; *Lee v. Stanley*, 9 *Id.* 272; *Chaine v. Wilson*, *supra*. *Contra*, see *Towner v. Church*, 2 *Abb. Pr.* 299. But it has been held that long continued absence from the State on business made a person a non-resident. *Haggart v. Morgan*, 4 *Sandf.* 198; affirmed, 5 *N. Y.* 422;

Note on Security for Costs.

Crawford v. Wilson 4 Barb. 504; *Wright v. Black*, 2 Wend. 253; *Burrill v. Jewett*, 2 Robt. 701; *Matter of Thompson*, 1 Wend. 43.

There is no fixed rule as to what length of absence on business will constitute one a non-resident (see cases last above cited); it must be in a measure permanent (*In re Thompson*, 1 Wend. 43; *Frost v. Brisbin*, 19 Id. 11; *Burrill v. Jewett*, *supra*), and its permanence does not depend solely upon past duration but the probability of a future continuance growing out of the object of the absence. *Burrill v. Jewett*, *supra*. One piece of business does not seem to be sufficient (*Matter of Fitzgerald*, 2 Cai. 318; *Boardman v. House*, 18 Wend. 512; *Crawford v. Wilson*, 4 Barb. 504; *Hurlbut v. Seeley*, 11 How. Pr. 507; S. C., 2 Abb. Pr. 138; *Burrill v. Jewett*, *supra*), unless it is long continued. *Haggart v. Morgan*, *supra*, *Burrill v. Jewett*, *supra*.

In *Crawford v. Wilson* (4 Barb. 504), it was held that a person leaving his place of fixed habitation and remaining in another place for a certain definite period and for a particular purpose,—e. g., under an engagement to teach school for four months,—does not lose his legal residence in such place of abode.

Where one C. came to New York city to reside, October 18, and did not subsequently leave it, and had previously hired a house and paid rent in advance for it, and his family moved to the city on October 25, it was *Held*, that he was a resident of this State on October 21. *Matter of Crawford*, 3 N. Y. Leg. Obs. 76.

In *Roberti v. Methodist Book Concern* (N. Y. Com. Pleas, 1859, 1 *Daly*, 3), a plaintiff, who had been absent from the State for more than two years on business, but whose wife and minor child continued to reside here, was not a non-resident in such sense that the court would compel him to file security for costs.

In *Frost v. Brisbin* (19 Wend. 11) a citizen of this State abandoned his residence here and commenced an actual and permanent residence in another State. Subsequently, he resolved to break up his business there as soon as he conveniently could, and meanwhile he returned temporarily to his former place of residence in this State. *Held*, that he was not a resident of the State within the act to abolish imprisonment for debt.

Where one formerly a resident of this State has abandoned his residence in another State and returned with his family to this State, but has not determined whether he will take up his residence here or elsewhere, he is not a resident of this State. He cannot be said to have any residence. *Burrows v. Miller*, 4 How. Pr. 349. See also, *Matter of Fitzgerald*, 2 Cai. 318.

An immigrant who has left forever his native land and lives here

Note on Security for Costs.

without determination to reside elsewhere was held in *Heidelbach v. Schland* (10 *How. Pr.* 477), to be a resident.

The fact that one was impelled to remove from one place to another by reason of his health requiring another climate does not preclude the removal from amounting to a change of domicil. If he left his former home with the intent of residing elsewhere it matters not what his inducements were. *Hegeman v. Fox*, 1 *Redf.* 298; affirmed, 14 *Barb.* 475. But see *Isham v. Gibbons*, *Id.* 69.

Where a plaintiff's business was of a somewhat transient nature, consisting of the introduction into ships, hospitals, &c., of a patent automatic ventilator, and for two years he had no abiding-place in this State, and did not have any property interests or place of business here, and his wife had traveled with him, and they had lived in Baltimore, Md., and Washington, D. C., and Chelsea, Mass.,—Held, that he was a non-resident of the State within meaning of the statute requiring security for costs; that his mere assertion of his continued residence in the city of New York, and of an intention to retain such residence, did not continue his residence; that his intention must be gathered from his acts considered with reference to his habits and occupations. *Norton v. Bennett*, 22 *Hun.* 604.

Where a plaintiff actually resident here was carried involuntarily to another State from which he was a fugitive, it was held that his removal changed his residence, and he might be required to give security for costs. *N. Y. Super. Ct.* 1841, *Long v. Hall*, 3 *Sandf.* 729; *S. C.*, 1 *Code R. N. S.* 114.

In the case of a mariner the question of residence is one of intention to be gathered from his acts and declarations. *Matter of Hale*, 2 *N. Y. Leg. Obs.* 189. See also *Sherwood v. Judd*, 3 *Bradf.* 267; *Matter of Scott*, 1 *Daly*, 584.

Enlistment and absence from the State in the volunteer army of the United States does not render one a non-resident. *Tibbitts v. Townsend*, 15 *Abb. Pr.* 221.

It is not enough, to effect a change of residence, that one intends to change and believes he has done what in law amounts to a change. The intent and fact must concur. *Chaine v. Wilson*, 8 *Abb. Pr.* 78. See also *Frost v. Brisbin*, 19 *Wend.* 11.

The fact that a non-resident plaintiff does not intend to continue permanently a non-resident does not relieve him from giving security for costs. *Gelch v. Barnaby*, 1 *Bow.* 657; *S. C.*, 7 *Abb. Pr.* 19. And see *Gilbert v. Gilbert*, 2 *Paige*, 608.

After an order overruling the demurrer with leave to answer on payment of costs, the defendant while in default of the payment is not entitled to security for costs from the plaintiff, if the plaintiff becomes

Note on Security for Costs.

a non-resident. *Supreme Ct., Sp. T. 1854, Butler v. Wood, 10 How. Pr. 813.*

When the plaintiff pending an appeal by defendant from a judgment recovered against him removes from the State he cannot while the judgment stands unreversed be compelled to file security for costs. *Flint v. Van Deusen, 24 Hun, 440.* See also *Kanouse v. Martin, 3 How. Pr. 24; Johnson v. Yeomans, 8 Id. 140; Frary v. Dakin, 8 Johns. 353.*

After suit brought a resident cannot be compelled to give security for costs until after an actual removal from the State; a contemplated removal is not enough. *Morten v. Domestic Tel. Co., 1 Abb. N. C. 270.*

A plaintiff who is a non-resident at the time of commencing his action, is not excused from filing security for costs, by the fact that he afterwards became a resident. *Supreme Ct., Sp. T. 1859, Ambler v. Ambler, 8 Abb. Pr. 340.*

Alien residents are not required to give security for costs unless such residence is shown to be merely temporary. *Norton v. Mackie, 8 Hun, 520.*

A non-resident plaintiff cannot be required to give security for costs where there are also resident plaintiffs, although such resident plaintiffs are insolvent. *Ten Broeck v. Reynolds, 13 How. Pr. 462.* And see *Gillespie v. Pfister, Col. & Cai. Cases, 121; S. C., 3 Johns. Cas. 470; Code Civ. Pro. § 8270.*

Where it appeared that the plaintiff of record, a resident, was prosecuting an action for the benefit of a non-resident, on a judgment recovered against the defendant in another State, and which had been assigned to the plaintiff of record by an assignment absolute on its face, it was held that the plaintiff of record could not be compelled to give security for costs. *Horton v. Shepherd, 1 N. Y. Civ. Pro. 26.*

Where the plaintiff on the record was a non-resident the defendant is entitled to security for costs, although the cause of action was assigned before the commencement of the action to a third person who was a resident of the State and for whose benefit the action was prosecuted. *Phenix v. Townshend, 2 Code R. 340.*

In *Charles v. Waterman (Supm. Ct. 1846, 2 How. Pr. 132)*, where the real party in interest was a non-resident, the plaintiff on the record, though a resident, was required to file security for costs; and in a similar case (*Allen v. Collins, 1 How. Pr. 251*), where the plaintiff of record was insolvent, security for costs was required. See also *Swift v. Collins, 1 Denio, 659; Jones v. Savage, 10 Wend. 621; 6 Id. 660; 2 Cow. 460.*

Where a non-resident plaintiff sold and transferred a note upon which the action was brought, to one who was a resident, after a motion that he be required to give security for costs was noticed, and three days before it was granted,—*Held*, that a motion to substitute the

Note on Security for Costs.

transferee in the place of the original plaintiff should be denied; that the assignment was subject to the then pending application for security for costs, and the order requiring it could not be defeated nor impaired by such transfer; that the practical effect of granting the application to substitute the transferee as plaintiff, would be to defeat the legal consequences of the order for security for costs, and that could not be done. *McNamara v. Harris*, 4 *N. Y. Civ. Pro.* 76.

After the commencement of an action by a non-resident plaintiff he cannot divest himself of his liability for costs, by assigning his interest in the claim in suit to a resident. The defendant notwithstanding such assignment would be entitled to his security. *Phenix v. Townsend*, 2 *Code R.* 2; *S. C.*, 2 *Sandf.* 684.

The court will not permit a non-resident plaintiff to evade the giving of security for costs by allowing him to sue in *forma pauperis*, *Christian v. Gourge*, 3 *N. Y. Law Bul.* 42; *S. C.*, 10 *Abb. N. C.* 82; *Anonymous*, *Id.* 80. A non-resident plaintiff suing in a representative capacity, must give security for costs. *Murphy v. Darlington*, 1 *Code R.* 85; *Ramsey v. Stringer*, 4 *Bow.* 668. *Contra*, *Goodrich v. Pendleton*, 3 *Johns. Ch.* 520; *More v. Durr*, 4 *Super.* 154; *Hall v. Waterbury*, 5 *Abb. N. C.* 356; *Wilbur v. White*, 56 *How. Pr.* 821.

Where there is a fund in court and there are several defendants who are claimants to it, and the result may be that the claimants will be paid out of the fund, no security will be required from the defendants who are claimants, although they are non-residents. They cannot be regarded as non-resident plaintiffs. *Coates v. Morris*, 1 *N. Y. Law Bul.* 29.

Where a county court had ordered a plaintiff residing in another county of the State to give security for costs, and the cause was thereafter removed to the supreme court, the latter court refused, in its discretion, to vacate the order. *Dyer v. Dunivan*, 3 *How. Pr.* 185.

In *Hasler v. Johnson*, *Mar. Ct. Sp. T. Sept.* 1880, 59 *How. Pr.* 432, it was held that a non-resident landlord, owning property in the city of New York, could not be required to give security for costs in summary proceedings to dispossess a tenant of such property.

In *Northrop v. Wright*, 1 *How. Pr.* 146, it was held that in an action of ejectment a non-resident plaintiff should be required to file security for costs.

Under the revised statutes it was held that a county court could not require security for costs from a non-resident plaintiff on appeal for a new trial from a municipal or justice's court. *Mellen v. Hutchins*, 8 *Abb. N. C.* 228.

In an action in the court of common pleas for the city and county of New York, a plaintiff who resides without the county of New York, but within the State cannot be required to give security for costs as

 Note on Security for Costs.

a non-resident. *Robb v. MacDonald*, 12 *Abb. Pr.* 213; *Bostwick v. Fifield*, 4 *N. Y. Civ. Pro.* 79. The court of common pleas for the city and county of New York is not a county court within the meaning of subdivision 1 of section 8268 of the Code of Civil Procedure. *Bostwick v. Fifield*, *supra*.

In the superior court of Buffalo a resident of the State cannot be required to give security for costs as a non-resident. *Montgomery v. Courter*, *Clinton N. Y. Dig.* 748.

In an action brought in the superior court of the city of New York since September 1, 1880, the defendant cannot require a plaintiff who resides in the State to give security for costs because he is a non-resident of the city and county of New York. *Lewis v. Farrell*, 46 *Super.* (14 *J. & S.*) 358; *Wiley v. Arnoux*, 60 *How. Pr.* 137.

In the city court of New York, formerly known as the marine court of the city of New York, a plaintiff "who has an office for the regular transaction of business in person within the city of New York is deemed a resident of that city within the meaning of sections 8268, and 8269" of the Code (*Code Civ. Pro.* § 3160), and cannot be required to give security for costs as a non-resident. Before he can be required to give security for costs, it must appear affirmatively that he has not such an office. *Stephenson v. Hauser*, *post*, p.

A foreign corporation. When plaintiff in an action brought in a court of record a foreign corporation must give security for costs. *Code*, § 8268, subd. 2.

The Code (§ 8343, subd. 18,) defines a "domestic corporation" as "a corporation created by or under the laws of the State or located in the State and created by or under the laws of the United States or by or pursuant to the laws in force the colony of New York, before the 19th day of April, in the year 1775. Every other corporation is a 'foreign corporation.'"

A foreign government suing in a court of this State, may be required, like any other non-resident plaintiff, to file security for costs. *N. Y. Superior Ct. Sp. T.* 1856, *Republic of Mexico v. Arrangois*, 3 *Abb. Pr.* 470.

A person imprisoned under execution for a crime, &c. The defendant in an action brought in a court of record may require a plaintiff who at the time of the commencement of the action was imprisoned under execution for a crime, or who after the commencement of the action is sentenced to the State prison for a term less than life, to give security for costs. *Code Civ. Pro.* §§ 8268, 8269.

Assignee. The official assignee of a person imprisoned under execution for a crime, the official assignee or official trustee of a debtor, or an assignee in bankruptcy, when plaintiff at the time of its commencement in an action brought in a court of record upon a

Note on Security for Costs.

cause of action arising before the assignment, the appointment of the trustee, or the adjudication in bankruptcy, may be required by the defendant to give security for costs. *Code Civ. Pro.* § 3258.

Where an insolvent had assigned over all his estate for the benefit of his creditors, and a judgment was recovered in his name, in the court of common pleas, on which a writ of error was brought, the assignees, for whose benefit the suit was prosecuted, were ordered to give security for the costs. *Supreme Ct.* 1809, *Ketcham v. Clark*, 4 *Johns.* 484. *Contra*, *Ferris v. American Ins. Co.*, 22 *Wend.* 586.

Bankrupts, insolvent and discharged debtors. Where the plaintiff in an action in the court of record is, after the commencement of the action, adjudicated a bankruptcy, or discharged from his debts or exonerated from imprisonment, pursuant to a law of the State or of the United States, he must, if the defendant require it, give security for costs. *Code Civ. Pro.* § 3269.

Under the revised statutes it was held that when security was claimed on the ground that the plaintiff was exonerated from imprisonment, that if he was so exonerated from imprisonment several years before the commencement of the suit, there would be a presumption that, having had time to acquire property, he had again become responsible for his debts, and that therefore he would not be required to file security for costs; but if such exoneration was very recent no such presumption would arise. *Gomez v. Garr*, 18 *Wend.* 577. It was also held that a bankrupt in an action for tort brought for his own benefit could not be required to give security for costs. *Supreme Ct.*, 1848, *Coryell v. Davis*, 5 *Hill*, 559.

Infants. An infant whose guardian *ad litem* has not given security for costs must do so. *Code Civ. Pro.* § 3268.

In *Steinberg v. Manhattan Ry. Co.* (46 *N. Y. Super.* [14 *J. & S.*] 216), it was held that a guardian *ad litem* could not be required to give security for costs; but in *Colden v. Haskins* (3 *Edw. Ch.* 311) and *McDonald v. Brass Goods Mfg. Co.* (2 *Abb. N. C.* 434), it was held that security could be required from him.

An infant must give it, if promptly demanded (*Code*, § 3268; *Kleinpeter v. Enell*, 2 *N. Y. Civ. Pro.* 21; *In re Daly*, *Id.* 22; *Healy v. Twenty-third St. Ry. Co.*, 1 *Id.* 15; *Meredith v. Forty-second St. and Grand St. R. R. Co.*, *Id.*); unless there are other parties plaintiff who cannot be required to give security for costs. *Hulbert v. Newell*, 4 *How. Pr.* 93; *Code*, 3270. Where a husband and wife joined in an action, the wife being an infant, it was held that security for costs could not be required on account of the wife's infancy. *Hulbert v. Newell*, *supra*; *Cook v. Rowdon*, 6 *How. Pr.* 233; *Thomas v. Thomas*, 18 *Barb.* 149.

In *Kleinpeter v. Enell* (2 *N. Y. Civ. Pro.* 21), it was held that

 Note on Security for Costs.

where an infant sues by guardian *ad litem* security for costs to defendant was a statutory right which the court had no power to destroy by allowing the guardian to sue as a poor person.

In *re* Daly (1 *N. Y. Civ. Pro.* 21), the mother of an infant asked to be appointed his guardian *ad litem* for the purpose of bringing an action to recover damages for personal injuries received by him, and also for an order permitting her to sue *in forma pauperis*. The court denied the application, holding that it had no power grant it; that it could neither permit the guardian *ad litem* to sue *in forma pauperis* nor permit the child to sue *in forma pauperis* and appoint the guardian afterwards so as to have the order enure to his benefit.

In *Nichols v. Cammann* (2 *N. Y. Civ. Pro.* 375), where an order had been granted upon an *ex parte* application appointing a guardian *ad litem* of an infant and permitting him to sue as a poor person, a motion to set aside such order and that the guardian *ad litem* give security for costs, was denied.

In *Irving v. Garrity*, *post*, p. 105, a motion to vacate an order requiring an infant suing by his guardian *ad litem* to give security for costs, and that he be permitted to sue *in forma pauperis*, was granted.

Motions that plaintiff file security for costs and that he be permitted to sue as a poor person cannot both be granted. *Florence v. Buckley*, 1 *Duer*, 705.

UNDER SECTION 3271 OF THE CODE.

Executors; Administrators; Trustees; etc. "In an action brought by or against an executor or administrator, in representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue or be sued; or by an official assignee, the assignee of a receiver or the committee of a person judicially declared to be incompetent to manage his affairs; the court may in its discretion, require the plaintiff to give security for costs." *Code Civ. Pro.* § 3271.

Security for costs cannot be required of an executor, administrator, trustee, etc., in a case in which he would not be liable for costs on a judgment. *N. Y. Superior Ct.*, 1852, *Darby v. Condit*, 1 *Duer*, 599; *S. C.*, 11 *N. Y. Leg. Obs.* 154.

"In an action brought by or against an executor or administrator, in his representative capacity or the trustee of an express trust or a person expressly authorized by statute to sue or to be sued, costs must be awarded, as in an action by or against a person prosecuting or defending in his own right except as otherwise prescribed in sections 1835 and 1836," of the Code; "but they are exclusively chargeable upon and collectible from the estate, fund, or person represented, unless the court directs them to be paid personally, for mismanagement or bad faith in the prosecution or defence of the action." *Code Civ. Pro.* § 3246. Sections 1835 and 1836 of the Code, provide that "where

Note on Security for Costs.

a judgment for a sum of money only is rendered against an executor or administrator in an action brought against him in his representative capacity costs shall not be awarded against him except . . . where it appears . . . that the plaintiff's demand was presented within the time limited by a notice published as prescribed by law, [2 *R. S.* 88; 3 *R. S. Banks'* 7 ed. 2299, §§ 84, 85], requiring creditors to present their claims; and that the payment thereof was unreasonably resisted or neglected, or that the defendant refused to refer the claim as prescribed by law; [2 *R. S.* 89; 3 *R. S. Banks'* 7 ed. 2299, § 86], the court may award costs against the executor or administrator, to be collected, either out of his individual property or out of the property of the decedent as the court directs, having reference to the facts which appeared upon the trial."

In *Shepherd v. Burt* (3 *Duer*, 645), it was held that the power of the court to order security for costs under section 817 of the Code of Procedure (for which sections 3246 and 3271 of the Code of Civil Procedure are substitutes) was purely discretionary and ought not to be exercised unless the imputation of bad faith is rendered at least highly probable. But in *Fish v. Wing* (1 *N. Y. Civ. Pro.* 281); and *Carney v. Bernheimer* (*Id.* 233 note) it was held that proof of bad faith or mismanagement is no longer required. Security will rarely be required of an administrator, etc., suing as such, unless there is gross negligence or bad faith on his part, and the evidence of such mismanagement must be positive and direct, and relate to the commencement and proceedings in the action in question and not to the conduct of the plaintiff in the general management of the trust. *Darby v. Condit*, 1 *Duer*, 599; *Shepherd v. Burt*, 3 *Id.* 645; *Kimberly v. Stewart*, 22 *How. Pr.* 281; *Kimberly v. Blackford*, 22 *Id.* 443; *Kimberly v. Goodrich*, 22 *Id.* 424; *Bolles v. Duff*, 17 *Abb. Pr.* 448; *McEntree v. McEntree*, 4 *N. Y. Law Bul.* 20.

An administrator appointed in this State and resident within the jurisdiction of the court in which he sues will not ordinarily be required to give security for costs in the absence of bad faith or mismanagement. *Norris v. Breed*, 1 *Sheld.* 271; S. C., 12 *Abb. Pr. N. S.* 185. See also *Gedney v. Purdy*, 47 *N. Y.* 676.

The court should not require an administrator who has brought and is prosecuting an action in good faith, to give security for costs therein, simply because he is the administrator of an estate that has no funds except the claim in suit. *Ryan v. Potter*, 4 *N. Y. Civ. Pro.* 80; *Darby v. Condit*, 1 *Duer*, 599. But where an administrator is a non-resident he should be required to give security for costs. *Murphy v. Darlington*, 1 *Code R.* 85. *Contra*, *Goodrich v. Fendleton*, 3 *Johns. Ch.* 500; *Carney v. Bernheimer*, 1 *N. Y. Civ. Pro.* 233, note.

In *Murphy v. Travers* (60 *How. Pr.* 801) it was held that the court

Note on Security for Costs.

would direct security for costs to be given by a plaintiff suing an executor upon proof that he is pecuniarily irresponsible.

Section 3271 applies only to an action originally brought by or against an executor or administrator, and not to an action originally brought by or against the deceased and revived by his personal representative. *Sullivan v. Remington Man'g Co.*, 2 *N. Y. Civ. Pro.* 68.

On a motion to compel a receiver to give security for costs on the ground that he has no funds in his hands it was held under the revised statutes that it must be shown that the action was brought in bad faith or heedlessly (*Jenkins v. Stow*, 2 *N. Y. Law Bul.* 57), and that when bad faith was shown he should be required to give security for costs. *Kimberly v. Goodrich*, 22 *How. Pr.* 424. Under the same statute it was also held that an order of court made *ex parte*, giving a receiver leave to sue was not a bar to a motion by the defendants to require such receiver to file security for costs. *Supreme Ct.* 1864, *Bolles v. Duff*, 17 *Abb. Pr.* 448.

Whether a receiver of an insolvent corporation should give security is in the discretion of the court at special term, and its order is not appealable to the general term or court of appeals. *Briggs v. Vanderbilt*, 12 *N. Y.* 467

In *Commissioners, &c. v. Casatiir* (*N. Y. Mar. Ct. Sp. T.*, 1881, 62 *How. Pr.* 113), where an action for a penalty was brought by a private person under the provisions of a statute authorizing such an action, if the commissioners of charities and correction neglect or refuse to sue, it was held, that the plaintiff should be required to give security for costs. See also *Commissioners of Excise v. Purdy*, 18 *Abb. Pr.* 484; *S. C.*, 36 *Barb.* 266; 22 *How. Pr.* 506.

Where a private person brought an action for the violation of the excise law, under the provisions of the statute authorizing such action if the board of excise neglected to sue for ten days after a complaint was made with reasonable proof,—*Quare*, whether the court could under section 3271 of the Code, require security for costs,—and *Held*, that if it had the power it ought not in its discretion to require it. *Comm'rs of Excise v. McGrath*, 27 *Hun*, 425.

An assignee in bankruptcy is the trustee of an express trust within the meaning of section 317 of the Code of Procedure; for which section 3271 of the New Code is a substitute. *Reade v. Waterhouse*, 53 *N. Y.* 587.

A plaintiff suing as a trustee of an express trust will be required to give security for costs when one of the beneficiaries is a non-resident of the state and another is an infant whose guardian *ad litem*, has not filed security for costs. *Fish v. Wing*, 1 *N. Y. Civ. Pro.* 231.

Where a national bank, pending an action brought by it, was

Note on Security for Costs.

reorganized and became a State bank and thereafter discontinued its business and took proceedings to close its affairs, held, under the former statute, that it must give security for costs. *Nat'l Exchange Bank v. Silliman*, 4 *Abb. N. C.* 224.

The Application and Order. Application for security for costs cannot be made until the defendant has appeared in the action (*Thomas v. Wilson*, 6 *Hill*, 257), nor while costs awarded against him are unpaid. *Butler v. Wood*, 10 *How. Pr.* 813.

The motion should be made so as not to delay plaintiff; otherwise, whether granted or denied, defendant will be charged with costs. *Carpenter v. Downing*, 6 *Hill*, 234.

When proceedings to obtain security are resorted to for delay or any improper purpose, the motion will be denied. *Supreme Ct.*, 1845, *Robinson v. Sinclair*, 1 *Den.* 628.

The application, in a case within section 8271 of the Code, must be made to the court in which the action is pending, and in a case provided for in section 8268 or 8269 of the Code, either to the court in which the action is pending or to a judge thereof. *Code Civ. Pro.* § 8273.

The order should require "the plaintiff within a time specified, either pay into court the sum of \$250 to be applied to the payment of the costs, if any, awarded against him, or, at his election, to file with the clerk an undertaking, and to serve a written notice of the payment or of the filing upon defendant's attorney" and stay "all other proceedings, on the part of the plaintiff except to review or vacate the order, until the payment or filing and notice thereof, and also, if an undertaking is given, the allowance of the same." *Code Civ. Pro.* § 3272.

The Code (§ 3272) restricts the power of the court as to the form of the order. It gives to a plaintiff who has been required to give security for costs, an election to either pay into court the sum of \$250 or give an undertaking. *Buckley v. Gutta Percha & Rubber Mfg. Co.*, 2 *N. Y. Civ. Pro.* 429; and see *Robertson v. Barnum*, 29 *Hun*, 657. In *Robertson v. Barnum* (*supra*), it was held that the court could not in the first instance, require more than \$250 security.

An order that plaintiff give security for costs should, if made *ex parte*, by the settled practice be in the alternative requiring security to be given within a specified time usually twenty days, or that plaintiff show cause why it should not be required, and staying plaintiff's proceedings *ad interim*. *Bronson v. Freeman*, 8 *How. Pr.* 493; *Cadwell v. Manning*, 15 *Abb. Pr.* 271; *Colt v. Wheeler*, 12 *Id.* 388. On the return day of the order to show cause if security has not been given, or good cause shown why it should not be required, an absolute order requiring it will be granted. *Id.*

Note on Security for Costs.

It seems that an absolute order, in the first instance, would be irregular. *Bronson v. Freeman, supra*. See also *Moore v. Merritt*, 9 *Wend.* 482; *Washburn v. Langley*, 16 *Abb. Pr.* 259.

Where the application is made upon notice the usual eight days notice of motion must be given. *Champlin v. Pierce*, 8 *Wend.* 445; *Blanchard v. Nessel*, 6 *Hill*, 256. To put the plaintiff in default a copy of the order must be served on his attorney. *Anderson v. Osborn*, 1 *How. Pr.* 79.

The stay contained in the order requiring security for costs will not *per se* extend the defendant's time to answer (*McGown v. Levenworth*, 2 *E. D. Smith*, 24; *Platt v. Townsend*, 8 *Abb. Pr.* 9; *S. C.*, 5 *Duer*, 668; *White v. Smith*, 16 *Abb. Pr.* 109, *note*), but the court or judge may make an order extending defendant's time to answer, a certain number of days, after the plaintiff files security for costs, and the sureties, if excepted to, shall justify. *Supreme Court, Sp. T.* 1853, *Bronson v. Freeman*, 8 *How. Pr.* 492.

The defendant may waive the stay by noticing the cause for trial. *Boyce v. Bates*, 8 *How. Pr.* 495. If, after procuring an order that plaintiff give security for costs the defendant takes any step in the action not directly connected with his order he will be deemed to have waived his right to security. *Id.*; *Hay v. Powers*, 2 *Edw. Ch.* 494.

The security. The Code requires a deposit of \$250 or an undertaking. *Code*, § 8272.

"The undertaking . . . must be executed to the defendant by one or more sureties and must be to the effect that they will pay, upon demand, to the defendant, all costs which may be awarded to him in the action not exceeding a sum specified in the undertaking, which must be at least \$250." *Code Civ. Pro.* § 8273

This provision is substantially the same as that of the revised statutes (2 *R. S.* 620, § 4), the principal difference being that now an undertaking is required, whereas the revised statutes required a bond.

One surety is enough (*Code*, §§ 811, 8273; *Micklethwait v. Rhodes*, 4 *Sandf. Ch.* 484); and the plaintiff need not himself join in the execution of it (*Code*, § 811; *Micklethwait v. Rhodes, supra*; *Wagner v. Adams*, 1 *How. Pr.* 191. If executed by two or more persons it must be joint and several and "must be accompanied with the affidavit of each surety, subjoined thereto, to the effect that he is a resident of and householder or freeholder within the State and is worth . . . twice the sum specified in the undertaking over all the debts and liabilities, which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution" (*Code*, § 812); it "must be acknowledged or proved and certified in like manner as a deed to be

Note on Security for Costs.

recorded." *Code*, § 810. An attorney at law cannot be a surety. *Supm. Ct. Rules* 6.

The undertaking for security for costs need not follow the precise words of the statute, but it will be sufficient as against defendant's objection, if equally favorable to the defendant. *N. Y. Superior Ct.* 1849, *Smith v. Norval*, 2 *Code R.* 14.

Each of two or more defendants cannot require a separate bond (*Leftwick v. Clinton*, 28 *How. Pr.* 26); but the undertaking should be executed in favor of all the defendants as obligees (*Id.*; *Montague v. Bassett*, 18 *Abb. Pr.* 18); and should be to pay "on demand." Demand from the plaintiff should not be required. *Id.*; *Tallmadge v. Wallis*, 1 *How. Pr.* 100.

Enforcing the Undertaking. Leave of court to sue the security for costs, is not necessary. *Supreme Ct.*, 1823, *Highley v. Robinson*, 7 *Wend.* 482.

If the defendant has waived strict compliance with the statute the sureties in an action against them cannot object that the bond [or undertaking] was not in due form. *Warner v. Ross*, 9 *Abb. N. C.* 385.

Where a non-resident plaintiff was required to give security for costs and pay ten dollars costs of the motion within ten days, and he filed a bond as security for costs but did not pay the costs and the defendant procured a dismissal of the action on account of the failure to pay the motion costs, it was held in an action against the sureties to the bond to recover the costs of the action that the defendant by procuring a dismissal of the complaint, in legal effect refused to accept the bond and that the same never went into effect or became operative. *Sup. Ct., 1st Dept. June*, 1880, *Remington v. Westermann*, 31 *Hun*, 440.

Where a party gives security for costs on commencing the action, and on bringing an appeal, the costs are not payable and cannot be collected, until the appeal is decided. And the defendant should not be allowed to sue on a bond given as security for costs, to recover moneys which he is not allowed to collect directly, by execution. *Supreme Ct.*, 1862, *Van Vleck v. Clark*, 38 *Barb.* 816; *S. C.*, *Van Vleck v. Clark*, 24 *How. Pr.* 190.

In *McCall v. Frith* (*post*, p. 102), it was held that where a party who made a deposit as security for costs was unsuccessful, and costs were awarded against him, and he took an appeal without securing a stay, the deposit should be applied to the payment of such costs, and in *Hoffman v. Lowell* (*post*, p. 108), it was held that where the party making a deposit was successful it should be returned to him, although his opponent had taken an appeal.

Excepting to and justification of sureties. "Within ten days,

Note on Security for Costs.

after the service of the notice of filing the undertaking the defendant may serve upon the plaintiff's attorney a notice that he excepts to the sureties therein. Within ten days after service of such a notice, the plaintiff must serve, upon the defendant's attorney, a notice of the justification of the same or new sureties before a judge of the court or a county judge at a specified time and place; the time to be not less than five nor more than ten days thereafter, and the place to be within the county where the action is triable." *Code Civ. Pro.* § 8274.

Notice that defendants "do not accept the bail put in," &c., is not sufficient notice of exception. *N. Y. Com. Pl.*, 1857, *Hartford Quarry Co. v. Pendleton*, 4 *Abb. Pr.* 460.

If defendant excepts to the surety, he must justify, notwithstanding an affidavit of jurisdiction was made and a copy of it served, with the undertaking. *Supreme Ct., Sp. T.*, 1853, *Bronson v. Freeman*, 8 *Hew. Pr.* 492. And see *Washburn v. Langley*, 15 *Abb. Pr.* 259; *Faulkner's case*, 4 *Hill*, 80.

Where under an order requiring the plaintiff to file security for costs, an undertaking executed by two sureties is filed, the jurisdiction of one of the sureties upon exceptions is sufficient. *N. Y. Superior Ct., Sp. T.* 1853, *Riggins v. Williams*, 2 *Duer*, 678.

The surety or sureties must justify in twice the amount of the undertaking. *Mount v. Mount*, 11 *Paige*, 383.

"For the purpose of justification each of the sureties must attend before the judge at the time and place mentioned in the notice and be examined on oath . . . touching his sufficiency, in such manner as the judge in his discretion thinks proper. The judge may, in his discretion, adjourn the examination from day to day until it is completed, but such an adjournment must always be to the next judicial day unless by consent of the parties. If required by the plaintiff's attorney the examination must be reduced to writing and subscribed by the sureties." *Code Civ. Pro.* §§ 8275, 580.

Where the judge finds the sureties sufficient he must annex the written examination, if any, to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk. Where the defendant fails duly to except to the sureties the undertaking is deemed allowed and must be indorsed and filed in like manner. *Code Civ. Pro.* § 8275.

Additional security. "At any time after the allowance of an undertaking, given pursuant to an order" requiring a plaintiff to give security for costs or by an attorney to relieve himself from his liability for costs as prescribed in section 8278 of the Code of Civil Procedure, "the court or a judge thereof upon satisfactory proof by affidavit that the sum specified in the undertaking is insufficient; or that or more of

 Note on Security for Costs.

the sureties have died or become insolvent or that his or their circumstances have become so precarious that there is reason to apprehend that the undertaking is insufficient for the security of the defendant; must make an order requiring the plaintiff to give an additional undertaking." *Code Civ. Pro.* § 3276.

It was held under the corresponding provision former statute (*Laws* 1875, ch. 305), that this provision should be liberally construed and additional security required at any stage of the action if the former surety is insufficient. *Fogg v. Edwards*, 57 *How. Pr.* 290.

Effect of Failure to give. "Where the plaintiff fails to comply with an order" requiring security for costs "or to procure the allowance of an undertaking given pursuant to such an order the defendant is entitled to a judgment dismissing the complaint and in his favor for costs. The defendant may apply therefor, as upon a motion." *Code Civ. Pro.* § 3277.

See, on this subject, under the revised statutes, *Freeman v. Tomey*, 8 *Robt.* 666; *Champlin v. Petrie*, 4 *Wend.* 209; *Glover v. Cumings*, 13 *Id.* 294; *Hinds v. Woodbury*, 29 *How. Pr.* 379.

Liability of Attorney. "Where a defendant is entitled to require security for costs, as prescribed in section 3268" of the Code, "the plaintiff's attorney is liable for the defendant's costs to an amount not exceeding \$100, until security is given as prescribed" in the Code. "The plaintiff's attorney may relieve himself from that liability although the defendant has not required security to be given, by filing and procuring the allowance of an undertaking as if an order" requiring security for costs had been made. *Code Civ. Pro.* § 3278.

The attorney is chargeable with costs only where the defendant could have required security. *Hulburt v. Newell*, 4 *How. Pr.* 93.

The attorney is liable if the real plaintiff is a non-resident, although the nominal plaintiff is a resident. *Waring v. Baret*, 2 *Cow.*, 460; *Supreme Ct.*, 1834, *Jones v. Savage*, 10 *Wend.* 621.

The liability continues where a suit begun by a non-resident of the county in a county court was removed to the supreme court. *Baley v. Warden*, 8 *Cow.* 118.

Where a plaintiff is a resident at the commencement of the suit, his subsequent removal will not make his attorney liable for costs, although he proceeded in the suit. *Supreme Ct.*, 1846, *Alexander v. Carpenter*, 3 *Den.* 266; *N. Y. Superior Ct.*, 1851, *Long v. Hall*, 8 *Sandf.* 729; *Moir v. Brown*, 9 *How. Pr.* 270. But see *Gillespie v. Stanless*, 1 *How. Pr.* 101.

The attorney's liability exists whether security has been required of the defendant or not. *Boyce v. Bates*, 8 *How. Pr.* 495; *In re Levy*, 2 *N. Y. Civ. Pro.* 108.

McCall v. Frith.

If an attorney commences an action in which the defendant might require security for costs under section 8268 of the Code such attorney becomes liable for such costs to the extent of \$100 until security is filed. *In re Levy, supra*. The fact that a motion to compel the plaintiff to file security for costs was denied on the ground of laches in making the motion, does not release the attorney from such liability. *Ib.*

The only way in which the liability of an attorney for costs under section 8278 of the Code can be properly adjudicated upon is on a motion for an order requiring the attorney to pay the costs. *In re Levy, supra*. An order, granted on such a motion, should not be enforced by an attachment against the person as for a contempt, but by execution against the property. *Ib.*; *Boyce v. Bates*, 8 *How. Pr.* 495.

McCALL v. FRITH, ET AL.

N. Y. SUPERIOR COURT, SPECIAL TERM, JANUARY,
1883

§ 8272.

Deposit as security for costs.—When to be paid to successful party.

Where a plaintiff has made a deposit as security for costs, and costs of the action were awarded against him, and he took an appeal, but there was no stay of proceedings,—*Held*, that the sum deposited should be applied to the payment of the costs; that it was not necessary that legal relief should be first exhausted.

(*Decided January 9, 1883.*)

Motion that the sum of \$250 deposited by plaintiff be applied to the payment of the costs of the action awarded to the defendant.

The plaintiff, being a non-resident of this State, was required to give security for costs (see *McCall v. Frith*, 2 *N. Y. Civ. Pro.* 9); and accordingly deposited \$250 as security for costs. Costs of the action were awarded

Hoffman v. Lowell.

against the plaintiff, and he took an appeal, but did not secure a stay of proceedings, and the defendant thereafter made this motion.

Stickney & Shepard, for the motion.

G. S. P. Stillman, opposed.

INGRAHAM, J.—Section 3272 contains the only provision in regard to the deposit by a non-resident as security for costs. It is there provided that the court shall require plaintiff to pay into court the sum of \$250 to be applied to the payment of the costs if any awarded against him, &c. As the costs in this action have been awarded against plaintiff and there is no stay of proceedings, I think the sum deposited should be applied to their payment. There is no provision that requires that legal relief should be first exhausted.

Motion granted.

HOFFMAN v. LOWELL AND ANOTHER.

CITY COURT OF NEW YORK, SPECIAL TERM, OCTOBER,
1883.

§ 3272.

Sum deposited as security for costs to be returned to plaintiff upon rendition of judgment in his favor.

When a plaintiff had made a deposit as security for costs and judgment was rendered in his favor,—*Held*, that the deposit should be returned to plaintiff; that the plaintiff having obtained judgment there is no ground upon which it can be held that he will ever be liable for costs, and that the fact that an appeal from the judgment was pending would not alter this, for the presumption is that the judgment will be sustained and not reversed.

(Decided October 23, 1883.)

Stephenson v. Hanson.

Motion by plaintiff that the sum of \$250 paid into court as security for costs be returned to him.

The plaintiff, pursuant to an order of the court, deposited \$250 as security for costs. He subsequently recovered judgment in the action against the defendant and thereupon made this motion. The defendant opposed the motion, stating that he intended to appeal, and claiming that the deposit should remain as security for his costs in case he ultimately recovered judgment.

E. P. Wilder, for motion.

Jacob Fromme, opposed.

HAWES, J.—The plaintiff having obtained a judgment there is no ground upon which it can be held that the plaintiff will ever be liable for any costs. An appeal may be taken, as is claimed by defendant; but even if it were now pending, it would be no defense to this motion, for the presumption is that the judgment will be sustained and not reversed. The cause having been tried the liability for costs is at an end, and the money deposited in lieu of the bond will be returned to plaintiff.

STEPHENSON v. HANSON.

CITY COURT OF NEW YORK, SPECIAL TERM, SEPTEMBER, 1883.

§§ 3160, 3268, 3269.

What must be shown on motion for security for costs on the ground of non-residence, in the City Court of New York.

In the city court of New York it must affirmatively appear, on a motion for security for costs on the ground of plaintiff's non-residence, that

Irving v. Garrity.

he has not an office or place for the regular transaction of business in the city of New York.
(Decided September 21, 1883.)

Motion for security for costs on the ground that the plaintiff is a non-resident of the city of New York.

W. B. Tullis, for motion,

J. D. McCullan, opposed.

HALL, J.—Motion for security for costs denied, as it does not appear affirmatively that the plaintiff has no office or place for the regular transaction of business in the city of New York. See *Code Civ. Pro.* § 3160.

Leave is granted to renew upon further affidavits. Plaintiff may have \$10 costs of opposing motion, to abide the event.

IRVING, AN INFANT, BY IRVING HER GUARDIAN
AD LITEM, v. GARRITY, ET AL.

SUPREME COURT, SECOND DEPARTMENT, KINGS
COUNTY SPECIAL TERM, AUGUST, 1883.

§§ 458, 460, 3268.

An infant may sue in forma pauperis.—The Code provides for any poor person.

The Code of Civil Procedure is broad enough to permit an infant to sue *in forma pauperis*. It provides for any poor person, and the spirit of the law would necessarily include minors. The object of the provision was to enable all conditions to obtain justice, and infants are generally favored in this respect.

Where an infant suing by his guardian *ad litem* after the granting of an order requiring him to give security for costs, moved to vacate

Irving v. Garrity.

such order and for an order authorizing him to sue *in forma pauperis*, and there was proof that the infant and his guardian *ad litem* were poor persons and unable to procure security for costs,—*Held*, that the motion should be granted.

(Decided September 27, 1883.)

Motion to vacate and set aside order directing plaintiff to give security for costs, and for an order authorizing the plaintiff to continue the action *in forma pauperis*.

This was an action for damages for injuries sustained by the plaintiff through the falling of a heavy stone slab, alleged to have been negligently placed on the public sidewalk by the defendants. On the application of the defendants an order was made at special term on July 14, 1883, directing plaintiff to make a deposit or file security for costs. Plaintiff's guardian *ad litem* thereupon applied upon a verified petition, at special term, to vacate the order requiring security and for authority to plaintiff to continue the action as a poor person.

- The petition alleged that the plaintiff had a good and substantial cause of action, stating the nature thereof; that the plaintiff and the guardian were poor and not worth \$100; that the guardian was the father of the plaintiff, an infant eleven years of age; that he was a car conductor by occupation, with a large family to support; that after the making of the order for security for costs, he had applied to his friends and used his best endeavors to obtain sureties to go on an undertaking for costs, but failed; and that, unless the court would authorize the plaintiff to continue the action as a poor person, her right to redress would be virtually defeated, and injustice done. Annexed to the petition was the affidavit of one of her attorneys certifying that the plaintiff had a good and substantial cause of action.

Irving v. Garrity.

Morris & Pearsall, for the motion :

The Code provides, in section 468, that "When an infant has a right of action, he is entitled to maintain an action thereon." He must sue, of course, through a guardian *ad litem* (§ 469). The Code also provides (§ 458) that "A poor person, not being of ability to sue, who alleges that he has a cause of action against another person, may apply for leave to sue as a poor person." If the court is satisfied of the truth of the facts alleged, it may authorize the plaintiff to prosecute as a poor person; in which case no costs shall be awarded against him (§§ 460, 461).

By the aforementioned provisions the Legislature has given to infants the same rights in our courts to prosecute their claims and redress their wrongs, as is given to adults. Where an infant is too poor to prosecute a good cause of action, he falls clearly within the provisions of sections 458 and 460, and the court has the power to grant to him the relief therein provided.

It is true that the Code also provides, in section 3268, that the defendant may require security for costs where the plaintiff "is an infant whose guardian *ad litem* has not given such security." All the provisions referred are parts and parcels of the same general law. They should, therefore, to carry out the intention of the legislature and further justice be construed together. The legislature manifestly intended that the doors of justice should not closed against any person because of his infancy or poverty.

The application, therefore, of section 3268 of the Code is limited by, and should be construed with, sections 458, 460, 468, and 469. Otherwise the beneficent provisions of section 468 will be in a large measure defeated.

It will be observed that the language used in section 458 is as positive as that of section 3268. It applies not

Irving v. Garrity.

only to adult litigants but to any man, woman or child. Such was manifestly the intention of the legislature.

It may be argued that security for costs having already been ordered, it is now too late to apply for leave to sue *in forma pauperis*. It will be seen, however, that the Code mentions no particular time within which the application shall be made. The Code says it shall be made to the court "in which the action is pending." The plea of poverty could not be set up in opposition to defendant's motion for security for costs. The remedy can be obtained only by direct application under section 458 of the Code.

James J. Rogers, opposed.

BARNARD, J.—The Code is broad enough to permit an infant to sue *in forma pauperis*. In a word, it provides for any poor person. The spirit of the law would necessarily include minors, for why leave them out? The object was to enable all conditions to obtain justice. Infants are generally favored in this respect. The guardian himself is poor and unable to pay attorneys. The case seems to be one where the order should be granted.

Train v. Friedman.

TRAIN, JR., APPELLANT, v. FRIEDMAN AND
ANOTHER, RESPONDENTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, MAY, 1883.

§ 531.

*Bill of particulars.—Will not be ordered where it appears that the defendant who seeks it has more knowledge of the particulars sought than the plaintiff.**

Where, in an action for money had and received by the defendant to the use of the plaintiff, it appeared, on a motion for a bill of particulars, that the plaintiff was unable to recollect or state the precise dates or amounts of the payments to the defendant, and that the defendant kept books of accounts containing such dates and other particulars,—*Held*, that as the defendant was possessed of more information on the subject than the plaintiff, a bill of particulars of plaintiff's claim should not be ordered.

(Decided June 1, 1883.)

Appeal from an order of this court made at special term, requiring plaintiff to deliver to defendant's attorney a bill of particulars of the claim alleged in the complaint.

This action was brought to recover \$34,000, money alleged to have been had and received by defendants to the use of plaintiff under the following circumstances, viz. : plaintiff deposited with the defendants from time to time between December 1, 1881, and December 1, 1882, one per cent. of the par value of a certain number of shares of stock upon the wager, either that the price of said stock taken at one-fourth of one per cent. above the quotation of the price thereof,

* See note on Bill of Particulars, 2 N. Y. Civ. Pro. 240.

Train v. Friedman.

at the New York Stock Exchange, at the time of said deposit, would not decline one per cent. from said price before it would advance, or that the price of said stock, taken, as aforesaid, at the time of such deposit, would not advance one per cent. from said price before it would decline, whereby an action accrued to the plaintiff according to the provisions of the statute against betting and gaming. The complaint does not state when the alleged different transactions were had, nor the amount deposited with defendants at any single time, nor what stock was bought or sold. A demand for a bill of particulars was made, and not being complied with, defendants, upon the complaint and upon the affidavit of the defendant, Max Friedman, stating that the complaint was so vague defendants could not answer it, and that they were ignorant of the particulars of plaintiff's claim, moved for a bill of particulars. Plaintiff opposed the motion with his affidavit showing that he kept no account or memorandum of the dates and amounts of money had and received by defendants to the use of plaintiff, and had no books of account, memorandum, vouchers or papers, showing such dates and amounts; that the money was deposited in cash with the defendants, from time to time, in various sums, between December 1, 1881, and December 1, 1882, and that plaintiff was unable to state or recollect the precise dates or amounts of such deposits; that defendants, at said times, were engaged in the business of making wagers or bets upon the price of stocks, and kept at No. 60 Broad street a place of business for that purpose, commonly known as a "bucket shop;" that at said times, defendants kept books of account showing the original entries of all wagers or bets made with them, containing the date of such deposits with them, the names of the persons making deposits on such wagers, the name of the stock, the amount of such deposits, and the terms upon which such deposits were

Train v. Friedman.

made, and who won; and that plaintiff was unable to furnish a bill of particulars of his claim.

The motion was granted, and from the order thereupon entered this appeal was taken.

Miller, Peckham & Dixon, for appellant.

Robert N. Wait, for respondents.

PER CURIAM (DAVIS, P. J., BRADY and DANIELS, JJ.)—It appears from the affidavit of the plaintiff that he is unable to recollect or state the precise dates or the amount of the disbursements that he made in his transactions with the defendants. They were made out, though in small amounts, aggregating five thousand dollars up to June 1881, and after that date and up to December, 1882, in larger amount, aggregating about twenty-nine thousand dollars.

And it appears from information given the plaintiff by two persons named in his affidavit, and which statement is not controverted, that the defendant kept books of account containing the dates of such deposits, the names of the persons, the purchasing and sales of stock, and the terms upon which the deposits were made and with whom. From these circumstances, the inference may fairly be drawn that the defendants are possessed of more information on the subject than the plaintiff. And for this reason, we think the order made was an improper one, and should be reversed with costs to abide the event.

 Prickhardt v. Robertson.

PRICKHARDT v. ROBERTSON.

MUSER v. THE SAME.

AND THIRTEEN OTHER CASES.

 U. S. CIRCUIT COURT, SOUTHERN DISTRICT OF NEW
 YORK, JULY, 1883.

§§ 481, 519.

Pleadings.—In an action in the U. S. Circuit court to recover excess of duties illegally exacted and paid, the sufficiency of the pleadings are to be determined by the N. Y. Code of Civil Procedure.—Instance of complaints in such actions held sufficient.—The ultimate facts only are to be stated in a complaint.—A statement in a pleading is not to be considered any the less a statement of fact because its ascertainment may depend upon some principles of law applicable to various other facts and circumstances.—Under the Code, the common count in indebitatus assumpsit for goods sold and delivered, or money had and received, is sufficient now as formerly.

In an action in the U. S. circuit court in this state, to recover back duties paid under protest and alleged to have been unlawfully exacted, the sufficiency of the pleadings is to be determined by the N. Y. Code of Civil Procedure.^[1]

The Code of Civil Procedure requires that a complaint contain a "plain and concise statement of the facts constituting a cause of action."^[1] The rule of pleading at common law was the same, viz.: that facts, not mere conclusions of law, were to be stated.^[1] The facts essential to be pleaded are the ultimate facts constituting the cause of action, not those other subsidiary matters of fact or law which go to make out the ultimate facts, and are evidences of the latter.^[2]

Where the complaint, in an action to recover back duties paid under protest and claimed to have been illegally exacted, alleged that "by law the true duty" on the goods imported was \$2,488.25, and that the collector of customs exacted as duties \$3,049, which plaintiff was compelled to pay to get his goods,—*Held*, that the statement that "by law the true duty on said goods was \$2,488.25," was not

Prickhardt v. Robertson.

a statement of a conclusion of law merely, but was a statement of one of the ultimate facts in the case as distinguished from mere evidence of such facts;[³,⁴,⁵] that if the "true amount of duty" is not an ultimate fact to be ascertained, then every circumstance about the goods which may affect the rate of duty, and upon which the determination of the duty depends, must be deemed the ultimate facts to be pleaded, and that no such pleading has ever, heretofore, been required or practiced.[⁴]

At common law, and under the statutes of this country, it has been held that an ordinary count, in *indebitatus assumpsit* for money had and received, is an appropriate mode of declaration to recover back an excess of duties exacted on the importation of goods,[⁷] and the N. Y. court of appeals has repeatedly held that, under the Code, the common count in *indebitatus assumpsit* for goods sold and delivered or for money had and received, is sufficient now as formerly.[⁹]

A statement in a pleading is not, in general, to be deemed any the less a statement of fact because its ascertainment may depend upon some principles of law applicable to various other facts and circumstances.[⁸]

Where, in an action to recover an alleged excess of duties paid to a collector of customs to obtain possession of merchandise imported for the plaintiff, the complaint alleged that the payment was made "under protest," and a bill of particulars was served showing that the protest required by section 8011 of the U. S. Revised Statutes as a condition precedent to the bringing of such an action, had been made in writing and duly filed,—*Held*, that, under section 519 of the Code of Civil Procedure, which provides that pleadings shall be "liberally construed with a view to substantial justice," that the complaint and bill of particulars taken together were sufficient.[¹⁰]

Where, in a similar case, the allegation was that due and timely protests, etc., in writing were filed,—*Held*, that this was clearly a sufficient plea of such precedent condition.[¹¹]

(Decided July 6, 1883.)

Demurrers, in each case, to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The opinion states the facts.

Elihu Root, U. S. District Attorney, and *Samuel B. Clark*, U. S. Assistant District Attorney, for demurrer in each case.

Prickhardt v. Robertson.

Stephen G. Clarke, John E. Hartley, C. Bainbridge Smith, and others, opposed.

BROWN, J.—That part of the complaint in these cases which sets forth the illegal exaction of duties is in general terms, stating the amount exacted, the amount which was the legal duty, and the payment to the defendant of the excess by compulsion, in order to obtain the goods. A bill of particulars is annexed to the complaint, stating the classification of the goods on each importation, and all the other particulars required in such cases by section 3012.* The complaint does not, however, state the rate of duty claimed by the plaintiff to be applicable, nor the rate exacted by the collector, nor the classification of the goods by the collector. The precise point of the controversy does not, therefore, appear from the complaint. The demurrer in this case, and in numerous others of a similar character, has been interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action, with the object of obtaining in future, if the court sustains the demurrer, a more intelligible

* Section 3012 of the U. S. Revised Statutes is as follows:

“No suit shall be maintained in any court for the recovery of duties alleged to have been erroneously or illegally exacted by collectors of customs, unless the plaintiff, within thirty days after due notice of the appearance of the defendant either in person or by attorney, serves on the defendant or his attorney a bill of particulars of the plaintiff's demand, giving the name of the imported or importers, the description of the merchandise and place from which imported; the name of the vessel or means of importation, the date of the invoice, the date of the entry at the custom-house, the precise amount of duty claimed to have been exacted in excess, the date of payment of said duties, the day and year on which protest was filed against the exaction thereof, the date of appeal thereon to the secretary of the treasury, and date of decision, if any, on such appeal, and if a bill of particulars containing all the above mentioned items be not served as aforesaid, a judgment of *non pros.* shall be rendered against the plaintiff or plaintiffs in said action.”

Prickhardt v. Robertson.

statement in the complaint of the precise point in controversy. It is urged that this is necessary, because, in the long time which often elapses before trial and the accumulation of thousands of such cases, it often happens that there is no record or paper in the district attorney's office showing the points in controversy, and no person, there or at the custom-house, able to give needed information to prepare for trial.

The protest and appeal which, by sections 2931, 3011,* must precede suits of this character, are required to give precisely the information, as to the points in dispute, which the learned district attorney now seeks to obtain. If the contents of the protests were embodied in the complaint, nothing more could be asked for. The complaint states that the plaintiff "filed with said defendant due and timely protests in writing upon each entry of said goods against his (the defendant's) decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto." By demurrer, the defendant admits that such protests were filed. As these protests are the basis of the secretary's examination and decision upon the appeal to him before suit, and designed to enable him to

* Section 2931 of the U. S. Revised Statutes provides for the protesting against the illegal exaction of duties on goods, etc., imported, and appealing from the decision of the collector of customs thereon to the secretary of the treasury. Section 3011 is as follows:

"Any person who shall have made payment under protest, and in order to obtain possession of merchandise imported for him to any collector or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest in writing and signed by the claimant or his agent was made and delivered at or before the payment setting forth distinctly and specifically the grounds of objection to the amount claimed."

Prickhardt v. Robertson.

correct any error without suit, the courts are very strict in exacting a careful compliance by the importer with the requirements of section 2931, 3011, that the protest shall "state specifically and distinctly the grounds of objection" to the duties exacted; and no suit can be maintained without such a previous protest, and no claim can be heard that is not distinctly set forth in it. (Thomson v. Maxwell, 2 Blatchf. [U. S. Circ. Ct.] 385, 391; Durand v. Lawrence, *Id.* 396; Pierson v. Lawrence, *Id.* 495, 499.) This protest, moreover, must be served on the collector at or before payment of the duties, and within 10 days after liquidation thereof, and appeal must be taken within 30 days therefrom, and suit must be brought, if at all, within 90 days after the secretary's decision; so that not only has the defendant precise information of the points in controversy in the written protest filed with him, but it must have been filed within so recent a period before suit as to be readily accessible to him, and while the controversy itself is presumably fresh in the memory of all the officers whose decision is brought in question by the suit. The bill of particulars, moreover, in all these cases, states the date of filing these protests, as well as the date of the appeal to the secretary. The defendant has full information, therefore, of the precise points in controversy, and, so far as he is concerned, no practical good would be accomplished by a repetition in the complaint of the details stated in the protests. If the office of the district attorney is not possessed of this information in these or in prior suits, it is because the defendant did not communicate to his attorney the information which he possessed, as he might easily have done, and as is ordinarily practiced between attorney and client. The present regulation of the secretary of the treasury, requiring such communication at the time issue is joined, will, if observed, supply the district attorney with such information in future.

Prickhardt v. Robertson.

The only question, then, is whether the complaints, all of which are in substance as above stated, contain what is technically a sufficient statement of a cause ['] of action. The sufficiency of the pleadings is to be determined by the New York Code of Civil Procedure. This requires a "plain and concise statement of the facts constituting a cause of action." Section 481. But the rule of pleading at common law was the same, viz., that facts, not mere conclusions of law, were to be stated. 1 *Chit. Pl.* 214; *Allen v. Patterson*, 7 *N. Y.* 478.*

The facts essential to be pleaded are, however, the ultimate facts constituting the cause of action, not ['] those other subsidiary matters of fact or law which go to make up the ultimate facts, and are evidences of the latter. There is often considerable doubt whether certain facts shall be taken to be essential parts of the very cause of action itself, or only evidence of it. To resolve this doubt, recourse is often had to the former rules of pleading, which by their approved forms,

* The term "facts," in the Code, means exactly what it did under the common law when applied to pleadings: *Dows v. Hotchkiss*, 10 *N. Y. Leg. Obs.* 281; *Carter v. Koezley*, 14 *Abb. Pr.* 147; and see *Howard v. Tiffany*, 8 *Sandf.* 695; *Boyce v. Brown*, 7 *Barb.* 80.

The words "facts constituting a cause of action," mean the facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the facts: *Wooden v. Strew*, 10 *How. Pr.* 48; *Boyce v. Brown*, 7 *Barb.* 80. Neither the evidence of facts nor the legal conclusions to be derived therefrom can properly be pleaded (*Russell v. Clapp*, 7 *Barb.* 482; *Glenny v. Hitchins*, 4 *How. Pr.* 98; *Lawrence v. Wright*, 2 *Duer*, 673; *Pattison v. Taylor*, 8 *Barb.* 250; *Boyce v. Brown*, *supra*; *Badeau v. Niles*, 9 *Abb. N. C.* 48); nor need the complaint set forth all the details of the facts. *Kelly v. Brencing*, 33 *Barb.* 123.

The facts on which the cause of action or defense rests, and not the circumstances which tend to prove them, should be alleged. *Shaw v. Jayne*, 4 *How. Pr.* 119; *Floyd v. Dearborn*, 2 *Code R.* 17; *Knowles v. Gee*, 4 *How. Pr.* 317; *S. C.*, 8 *Barb.* 350; *William v. Hayes*, 5 *How. Pr.* 470.

Prickhardt v. Robertson.

show what are regarded as the ultimate facts constituting the cause of action. On this demurrer it was claimed that the complaint does not state facts, but only conclusions of law. This clearly is not accurate. The complaint in the Muser case, which is a sample of most of the fifteen complaints, states that the true duty by law on the goods imported was \$2,483.25 ; that the collector exacted as duties \$3,049, which the plaintiff was compelled to pay to get his goods, being \$565.75 in excess of the legal duties, which excess he now seeks to recover. The statement of the amount exacted and paid is certainly a statement of pure fact ; the only question that can be made is whether the statement that "by law the true duty on said goods was \$2,482.25," is a statement of a conclusion of law merely, or a statement of fact. In my opinion it should be considered as a statement of one of the ultimate facts in the case, as distinguished from the mere evidence of such fact. What the true duty is depends on a great variety of circumstances. There is no dispute about the letter of the law, but upon the application of different sections of the law ; and this may depend upon many circumstances to be given in evidence, such as the kind of goods, their quality, fineness, weight, mode of manufacture, component material, the relative proportions or value of different component materials, their commercial designation, and numerous other circumstances which may be involved in the determination of the true duty. If the "true amount of duty" is not an ultimate fact to be ascertained, then every circumstance about the goods, which may affect the rate of duty and upon which the determination of the duty depends, must be deemed the ultimate facts necessary to be pleaded ; and the result would be a requirement to plead a minute description of the goods in all particulars which might affect the rate of duty. No such pleading has ever heretofore been

Prickhardt v. Robertson.

required or practiced. To require that would be to require, as it seems to me, mere evidence of the one ultimate fact which constitutes the cause of action.

On the rule contended for, it would not be sufficient to designate the goods even by their statutory classification, or to allege that they were dutiable at a certain rate, since this classification, or rate, is often the only subject of controversy, and depends on various other circumstances of fact and principles of law. In the *Muser* case the goods are designated as "thread laces,"—a statutory classification; but suppose they are in fact black silk laces, and, except in color and material, are precisely the same as white linen thread laces, and are dealt in by the name of thread laces, or black thread lace, while the statute imposes a higher duty on silk laces, or other manufactures of silk. The question of the proper classification would then involve the law of commercial designation and statutory construction, as well, probably, as numerous controverted matters of fact. See *Smith v. Field*, 105 *U. S.* 52. But no one would, I think, contend that all these details should be pleaded, or that a simple statement, as one of the ultimate facts in the case, that the goods were "thread laces," was not a statement of fact, but a conclusion of law. So, when the rate of duty is affected by the number of threads to the square inch, or the weight, surely these need not be pleaded.

In general, I think, it may be said that a statement is not to be deemed any the less a statement of ["] fact, because its ascertainment may depend upon some principles of law applicable to various other facts and circumstances. Thus a plea of payment is a plea of fact of the simplest form; yet it may involve very nice questions of law and fact, arising from the legal rules concerning the application of payments upon the particular circumstances of fact that may be proved in the case. So, a statement that A. sold and

Prickhardt v. Robertson.

delivered goods to B. is plainly a statement of fact for the purposes of pleading, although on the trial the issue turns out to be one of law, whether, under the particular facts proved, the transaction was a sale, or a mortgage, or a bailment, or a loan. *Norton v Woodruff*, 2 *N. Y.* 153; 4 *N. Y.* 76.*

The chief ultimate facts which in this class of cases constitute the cause of action are that the true, or legal, or lawful duty—it is immaterial in which form stated—was a certain sum, and that the collector exacted a certain larger sum; or, in a single phrase, that the collector on a certain importation exacted a certain sum of money in excess of the legal duty.

How that legal duty is arrived at, *i. e.*, the methods ['] and rules of law and various circumstances of fact by which that legal duty is ascertained and determined, are all subordinate questions, and are only evidence leading to the one ultimate fact of the illegal exaction of a given sum of money.

This view is sustained by the form of action sanctioned by long usage in such cases. At common ['] law, and under the statutes of this country, it has been held that an ordinary count *indebitatus assumpsit* for money had and received, is an appropriate mode of declaration to recover back an excess of duties exacted on the importation of goods. *City of Philadelphia v. Collector*, 5 *Wall.* [72 *U. S.*] 720, 726, 731; *State Tonnage Tax Cases*, 12 *Wall.* [79 *U. S.*] 204, 209; *Elliott v. Swartwout*, 10 *Pet.* 137; 2 *Greenl. Ec.* § 121. The exaction of money beyond the legal rate, whether for duties, tolls, or taxes, is the one ultimate fact which in law constitutes the receipt of the ['] money to the use of the person illegally compelled to pay it. All the other facts and circumstances of the case, and any principles of law applicable to

* *Mallory v. Willis*.

Prickhardt v. Robertson.

them, and determining their effect or construction, are only subsidiary, and evidences of the one ultimate fact to be proved, viz, the unauthorized exaction of a certain sum of money.

Under the Code, the court of appeals has repeatedly held that the common count in *indebitatus* [] *assumpsit* for goods sold and delivered, or for money had and received, is sufficient now as formerly. *Allen v. Patterson*, 7 *N. Y.* 476; *Moffet v. Sackett*, 18 *N. Y.* 522, 525; *Hosley v. Black*, 28 *N. Y.* 438, 443; *Farron v. Sherwood*, 17 *N. Y.* 227; *Hurst v. Litchfield*, 39 *N. Y.* 377, 380; *Adams v. Holley*, 12 *How. Pr.* 326, 327, 329; *Cudlipp v. Whipple*, 4 *Duer*, 610. In the case of *Platt v. Stout*, 14 *Abb. Pr.* 178, the general term of the supreme court in this district, in a suit to recover fees illegally detained by the defendant as pretended chamberlain, held, upon demurrer to the complaint, which was in form substantially identical with the present in stating that the defendant wrongfully and unlawfully usurped the functions of the office of chamberlain and received the fees thereof, that those were statements of fact, and that the complaint was sufficient. To the same effect, see *People v. Ryder*, 12 *N. Y.* 433; *People v. Carpenter*, 24 *N. Y.* 86.

Where a statement of fact, though in form allowable, is so general as not to afford sufficient knowledge of the particular question to be tried, the complaint may be required to be made more definite and certain, (Code, § 546,) and that would seem to be the proper remedy where the defendant is really without means of information of the real points in controversy. But congress has by law already so carefully provided for full information to the collector on all points in dispute as to the payment of duties, through the requirement of protest and appeal before suit, and a bill of particulars to be served afterwards (section 3012), that

Prickhardt v. Robertson.

occasions must be rare in which full information is not already in the defendant's possession before answer.

In the case of Prickhardt, the complaint in regard to the protests merely states that the plaintiff paid "under protest." This alone is clearly not equivalent to a statement of having made a protest in writing, nor of having filed it within 10 days after liquidation. At first, the complaint in that case seemed to me defective in this respect; but section 3011 says: "Any person who shall have made payment *under protest*, etc., may maintain his action," etc. This complaint states exactly these words, and exactly conforms, therefore, to this clause of the statute, and it is doubtful whether that is not sufficient pleading under this section, leaving it to be shown by proof that the terms and time of the protest were such as to entitle the plaintiff to a recovery; and the bill of particulars served with the complaint does show that the protests must have ["] been in writing and duly filed. Under section 519 of the Code, providing that pleadings are to be "liberally construed, with a view to substantial justice," I think the complaint and bill of particulars should together be held sufficient.

In the other cases, the statement that due and timely protests, etc., in writing, were filed, is ["] clearly a sufficient plea of such precedent conditions (Code, § 533), and is sustained by analogous decisions: *People v. Walker*, 23 *Barb.* 305; *Woodbury v. Sackrider*, 2 *Abb. Pr.* 402; *Farmer's Bank v. Empire, etc. Co.*, 5 *Bosw.* 275; *French v. Willett*, 10 *Abb. Pr.* 102. The demurrers must, therefore, be overruled, with liberty to withdraw them, and answer, if desired, within 20 days; the orders to be settled on notice.

Dickie v. Austin.

DICKIE v. AUSTIN, ET AL.

CITY COURT OF NEW YORK, SPECIAL TERM,
AUGUST, 1883.§§ 803, *et seq.*

Discovery of books.—Petition for, must state what information is wanted, and that the books contain it.—Instance of a case in which it should not be granted.

On an application for an inspection of books, the petition must state what information is wanted, and that the books, an inspection of which is sought, contain such information. It is not enough to show that they probably will furnish the desired information.

Plaintiff claimed that he was to receive one-third of the gross profits on certain sales made by him for the defendants; that settlements were had from time to time on statements furnished by the defendants, and that the defendants unlawfully deducted from the plaintiff's share of the profits "certain sums," amounting in the aggregate to \$2000, which he claims he should have received, and to recover which he brings this action,—*Held*, that an application by plaintiff for an inspection of the defendants' sales-books and ledger, wherein the accounts of such sales were kept, should be denied; *Also held*, where the plaintiff stated in his petition for an inspection, that he was "unable to name specifically all the books which would be necessary," and the inspection sought was intended to cover any book which the defendants had relating to the transactions in which plaintiff was interested, that the application should be denied; that the discovery sought was unusually broad and sweeping, and not such as courts are in the habit of granting in aid of common-law action for the recovery of a specific sum of money, and that such applications were, as a rule, referred to courts of equity.

(*Decided August 25, 1883.*)

Motion by plaintiff for an inspection of books of the defendants.

The facts are stated in the opinion.

Dickie v. Austin.

Morrison & Kennedy, for the motion.

E. H. Benn, opposed.

MCADAM, J.—The plaintiff claims that he was to receive one-third of the gross profits on certain sales made by him for the defendants. These sales are said to aggregate \$264,343.58. It appears that settlements were had from time to time on statements furnished by the defendants. But the plaintiff now insists that in these accounts the defendants unlawfully deducted from his share of the profits "certain sums" which, he claims, he should have received, but did not. This action was brought to recover those sums, which the plaintiff supposes aggregate about \$2,000. The present application is for an inspection of the sales-books used by the defendants between May 1, 1880, and May 1, 1883, as well as the ledgers used during that period, wherein the plaintiff's account was kept and in which the merchandise and sales account were entered.

The object of the inspection is to enable the plaintiff to prepare for the trial of the action. The petitioner says that "he is unable to name specifically all the books which will be necessary," and the inspection is intended to cover any books which the defendants have relating to the transactions in which the plaintiff was interested. I need not say that such a discovery is usually broad and sweeping and not such as courts are in the habit of granting in aid of common-law actions for the recovery of a specific sum of money. Such applications are, as a rule, referred to courts of equity (1 *Sandf.* 700).* The character of the application and the general manner in which the alleged indebtedness is expressed, as "certain sums" amounting to "about" \$2,000 indicate, in a mild way, that the

* *Sheldon v. Allerton.*

Dickie v. Austin.

plaintiff does not really know whether he has a cause of action or not, and that a discovery before the trial is therefore material to enable the plaintiff to determine how to prove his cause of action, if it can be proved at all. In this view the application is a prudent one for the plaintiff to make; but it does not follow, from this circumstance, that it ought, in the exercise of a wise discretion, to be granted.

There are certain general rules which regulate applications like the present, one of which is that the petition must state what information is wanted, and that the books referred to contain such entries (19 *Abb. Pr.* 111; * *S. C.*, 44 *Barb.* 39). It is not enough to show that they probably will furnish the desired information (38 *How. Pr.* 177), and an application for the discovery of documents was denied, where the petition did not point to the places where the information sought for existed, nor describe the entries except by stating their supposed effect (55 *How. Pr.* 351).† In *Cutter v. Pool* (3 *Abb. N. C.* 130), a case somewhat like the present, the court denied the application, leaving the plaintiff to procure whatever books he required upon the trial by the ordinary process of subpoena duces tecum. In 12 *Leg. Obs.* 137,‡ it was said: "If the discovery is plainly attainable by competent and available testimony, a production of books should not be allowed without special circumstances."

The only special circumstances which appear in this case, are those before mentioned, and these do not bring the case within any rule which justifies me in granting the relief applied for. It follows that the application must be denied, with \$10 costs to abide the event.

* *Walker v. Granite Bank.*† *New England Iron Co. v. N. Y. Loan & Imp. Co.*‡ *Terry v. Rubel.*

Dusenbury v. Dusenbury.

DUSENBURY AND ANOTHER, RESPONDENTS, v.
DUSENBURY, AS ADMINISTRATOR, ETC.,
APPELLANT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM,
MARCH, 1882.

§§ 481, subd. 3, 713, subd. 1, 1207.

Receiver.—Order appointing, should not be made on concurrent demands in answer and reply, where motion-papers do not bring the case within the provisions of the Code, authorizing court to make such an order.—A party to an action may demand any relief, but is not precluded by his demand from refusing to take it or asking additional relief.—
Court when controlled by relief demanded in awarding judgment.

Where a defendant in his answer prayed for the appointment of a receiver pending the action, and the plaintiff in his reply demanded the same relief, and a receiver was appointed before final judgment on the application of the plaintiff, on papers which did not bring the case within the provisions of the Code authorizing the court to grant such an order, — *Held*, on appeal from the order appointing the receiver, that the appointment of the receiver could not be sustained on such concurrent demands, and the order should be reversed.

A party should ask any relief to which he supposes himself entitled, but his doing so does not preclude him from declining to take any part thereof, nor from demanding aught additional supported by the facts.

The demand for relief in a pleading is given controlling effect but in one instance, namely, when there is no answer. The judgment must then be restricted to what is asked for in the complaint, but if an answer is interposed, the court grants any relief within the case shown by the complaint, and embraced in the issues.

(Decided June 5, 1882.)

Appeal from an order of the Special Term, made on application of the plaintiff, appointing a receiver *pendente lite*. The plaintiffs, claiming to be the surviving

Dusenbury v. Dusenbury.

partners of the firm of Thomas Dusenbury & Sons, brought this action against the defendant as administrator of said Thomas Dusenbury, who, in his lifetime was a member of said firm to recover possession of the assets of said firm, or for the value thereof in case a delivery could not be had. The defendant in his answer admitted that he had possession of the property sought to be recovered ; denied that the plaintiff and said Thomas Dusenbury were co-partners, and set up a counter-claim. In his prayer for relief he asked for an accounting, and that pending the action a receiver of the property in question, be appointed. The appointment of a receiver, as demanded in the answer, was also prayed for in the plaintiffs' reply. The plaintiffs moved for the appointment of a receiver, as asked in the answer and reply, and their motion was granted. In their moving-papers no ground for the appointment of a receiver other than the concurrent demands therefor in the answer and reply was shown, and the appointment was made on the demands alone.

Ira D. Warren, for appellant.

Hall & Blandy, for respondents.

PER CURIAM. (BEACH, J.)—The learned counsel for the respondents admits that the order cannot be sustained, save upon the concurrent demands in the answer and reply. The motion-papers do not bring the case within the provisions of the Code, authorizing the court to grant such an order (*Code of Civil Pro.* § 713, subd. 1). I am of opinion the learned court below gave an effect to the defendant's demand for relief much greater than is warranted by its nature or force. A party should ask for any relief to which he supposes himself entitled ; but his so doing does not preclude him from declining to take any part thereof, nor from demanding aught additional supported by the

Dusenbury v. Dusenbury.

facts. Neither is the court limited in awarding judgment, that is given in accord with the facts, and not the requests of the suitor. A different principle would make the action of the court subordinate to the wish of parties instead of the rules of law or practice. This portion of a pleading is given controlling effect but in one instance. It is when there is no answer the judgment must be restricted to what is asked for in the complaint. If an answer is interposed, the court grants any relief within the case shown by the complaint, and embraced in the issue.* The order should be reversed with costs.

J. F. DALY and VAN HOESEN, JJ., concurred.

* Code of Civil Procedure, §§ 481, subd. 1; 1207. See on this subject, *Jones v. Butler*, 20 *How. Pr.* 189; S. C., 30 *Barb.* 641; *N. Y. Ice Co. v. North Western Ins. Co.*, 23 *N. Y.* 357; *Armitage v. Pulver*, 37 *N. Y.* 494; See *v. Partridge*, 2 *Duer*, 463; *Smith v. Howard*, 20 *How. Pr.* 151; *Cowenhoven v. City of Brooklyn*, 38 *Barb.* 9; *Bradley v. Aldrich*, 40 *N. Y.* 504; *Arnold v. Angel*, 62 *Id.* 506; *Stevens v. Mayor*, 84 *Id.* 296; *Durand v. Hankerson*, 39 *Id.* 287; *Marquart v. Marquart*, 12 *Id.* 336; *Rome Exc. Bank v. Eames*, 1 *Keyes*, 588; *Towle v. Jones*, 1 *Robt.* 87; *Ryder v. Jenny*, 2 *Id.* 56; *Wright v. Wright*, 54 *N. Y.* 437; *Mills v. Bliss*, 55 *Id.* 139; *Hale v. Omaha Nat'l Bank*, 49 *Id.* 626.

If the defendant answers, the demand for relief becomes immaterial. *Marquart v. Marquart*, 12 *N. Y.* 336; *Emery v. Pease*, 20 *Id.* 62; *Redfield v. Frear*, 9 *Abb. N. S.* 449; *Hopkins v. Lane*, 2 *Hun*, 38; *Caswell v. West*, 3 *T. & C. (N. Y. Sup.)* 883.

Estate of Orser.

ESTATE OF DEBORAH ORSER, DECEASED.

SURROGATE'S COURT, WESTCHESTER COUNTY, 1883.

§ 2743.

Surrogates have power to hear and determine controversies in regard to the title to or any other question concerning a legacy or distributive share.—Construction of statutes.—Subscribing witness cannot take under will any greater share in estate than he would have taken by descent, if no will had been made.*

The Code of Civil Procedure does not forbid surrogates from deciding a controversy in regard to the title to or any other question concerning a legacy or a distributive share, and the practice of hearing and determining such controversies, which has prevailed in surrogates' courts for more than half a century, still continues.^[5]

The words "distributive share" in section 2743 of the Code, which provides that, "where the validity of a debt, claim or distributive share is not disputed or has been established," the surrogate may, in his decree, determine to whom it is payable, etc., were evidently, inadvertently inserted.^[1] The sentence quoted implies the existence of such share, and if the share exists, it is because it is fixed by statute, and if it is disputed it is disputing the statute.^[1]

The provision of section 2743 of the Code, that, where the validity of a debt, claim or distributive share is not disputed or has been established, the decree must determine to whom it is payable, the sum to be paid by reason thereof, and all other questions concerning the same, means that the surrogate must determine all questions other than that of the validity of the debt, etc., and to do that, he must try it.^[2]

A mere change of phraseology made in a revision of a statute should not be deemed or construed as a change in the law, unless it evidently appears that such was the intention of the legislature.^[3]

A long and uninterrupted practice under a statute is regarded as good evidence of its construction.^[4]

A subscribing witness to a will, who is one of the two witnesses residing in the state and competent to testify, without whose

* See *In re Brown*, 3 N. Y. Civ. Pro. 89.

Estate of Orser.

testimony the will could not have been proved, is precluded from taking any more than his distributive share of the personalty, or the share of the realty which would have descended to him in case the will had not been established.[⁴]

Where the residue of an estate, after the payment of certain legacies, was devised to one M. M., and one I. F. B., and directed to be divided equally between them, and said I. F. B. was a subscribing witness to the will, whose testimony was necessary to secure its probate,—*Held*, that the devise to I. F. B. was void, except that he might take the share in the estate to which he would have been entitled had the decedent died intestate; [⁷] but that fact did not, in any manner, affect the bequest to M. M.; [⁸] that the will was to be regarded as if one-half of the residuum had been given to M. M., and the other half left undisposed of. [⁹]

Objections to the accounts of Isaac F. Brown, executor.

In 1864, one William Orser died, leaving three brothers and three sisters who were his only next of kin and heirs-at-law, and leaving a will by which, after disposing of a portion of his property, he directed that the residue, which subsequently was found to be \$3,856.23, be converted into money, and such money invested in good securities for the benefit of his three sisters, Deborah, Sarah and Matilda, during their natural life each to receive an equal share in the interest accruing thereon. He did not make any disposition of the remainder.

Sarah, one of these three devisees, subsequently died leaving a will wherein Isaac F. Brown, who was the executor of William Orser's will, was named as executor and residuary legatee. He charged himself in his accounts as executor of her will, with one-third of the \$3,856.23 as having received it.

Deborah, another of the said devisees, died in 1879, leaving a last will and testament dated September 10, 1877, which, after bequeathing various legacies, gave the remainder of her estate to Isaac F. Brown and

Estate of Orser.

Margaret Miller, and directed that it be divided equally between them. Brown was a subscribing witness to the will, and it was admitted to probate in March, 1880, on his testimony and that of another subscribing witness. He was also its executor. On his accounting as executor, objection was made to his taking the half of the residue of the estate devised to him because he was a subscribing witness to the will. Deborah Orser did not leave her, surviving, any husband or descendants, and her only next of kin were a sister and several nieces and nephews, children of deceased brothers and a deceased sister.

Other facts are stated in the opinion.

Francis Larkin and *N. H. Baker*, for the executor.

John G. Miller, for Margaret Miller.

Charles M. Hall, for next of kin.

COFFIN, S.—As the next of kin claim that the provision of the will in favor of the executor is void by statute, and that they as such are entitled to their several distributive shares of the amount of the bequest attempted to be made to him, and as this claim is disputed by the executor, it becomes necessary to determine whether this court has, under the provisions of the Code of Civil Procedure, any jurisdiction in the premises. I do not perceive anything in the third sentence of section 2743 preventing me from passing upon the question. It strikes me that the words ['] “distributive share” have been inadvertently inserted, as it is impossible to conceive how the validity of a distributive share can, or cannot be disputed. The sentence implies the existence of such share. If the share exist, it is because it is fixed by

Estate of Orser.

statute, and if it be disputed it is disputing the statute. There seems to be no provision prohibiting the surrogate from determining a controversy as to whether a person claiming to be the owner of and entitled to a distributive share is so entitled. I think we have no right to interpolate words which would have the effect of depriving him of a power heretofore exercised. Strike out those words, and he is simply deprived of the jurisdiction, as he has been hitherto of trying the validity of a debt or claim which is disputed.

Section 71 of the R. S. [2 R. S. 93] and section 2743 of the Code, so far as this question is concerned, do not differ very materially. The former provided that the surrogate in his decree should settle and determine all questions concerning any debt, claim, legacy, bequest or distributive share, to whom it should be payable, and the sum to be paid. The latter, that where the validity of a debt, claim, or distributive share is not disputed, or has been established, the decree must determine to whom it is payable, the sum to be paid [?] by reason thereof, and all other questions concerning the same. This, of course, means that the surrogate must determine all questions other than that of the validity of the debt, etc., and he is directed by his decree to determine to whom the same is payable and the sum to be paid. If there arise a question on either subject, surely his decree cannot determine it unless he try to decide it. How, therefore, when there is a dispute as to a right to a distributive share, or as to the amount of any such share, can he escape or evade the duty of trying and deciding it? See *Riggs v. Cragg* (89 N. Y. 491), reported since this opinion was prepared.

The long controversy in the courts as to the power of a surrogate to try a disputed debt or claim, was finally put at rest by the court of appeals, in *Tucker*

Estate of Orser.

v. Tucker (4 *Keyes*, 136), denying such power. That decision was based upon the reasoning of HARRIS, J., in *Magee v. Vedder* (6 *Barb.* 352). That able jurist viewed all the statutory provisions relating to the mode of recovering debts against deceased persons, the notice to creditors, the presentation of debts or claims to the executors, and the provisions for reference in case of dispute, etc., and he pronounced the scheme of the revisers in that regard admirable. It will be readily seen that there was, and is, no scheme as to legacies or distributive shares, no provision for publication, for presentation or for reference in case of dispute as to person or amount.

I am not aware that the power of a surrogate to determine a controversy as to the person of a legatee or distributee, or the amount to which either was entitled, has ever been questioned ; but the books are full of cases where it has been done and sanctioned by the appellate courts. Even in *Magee v. Vedder* (*supra*) the learned judge quoted, with strong expressions of approbation, the language of Surrogate Ogden in regard to the power of a surrogate to try a disputed debt. He said : " When, therefore, the 71st section declares that the decree of the surrogate shall settle and determine all questions concerning any debt, &c., it does not mean that he is to determine the validity of the debts, but their priority, the amount due upon them, and to whom they belong, whether to the original creditor or to his assignee or his executor, &c."

Among other cases, showing a recognition by the higher courts of the power of the surrogate to try and determine the question of a right to a distributive share, I may mention the case of the will of Isaac M. Singer, where the sole question tried before me, and where some \$15,000,000 was involved, was whether Mrs. Foster was his widow and entitled to a distributive share of his estate as such. Able and distinguished counsel,

Estate of Orser.

among whom was a former judge of the court of appeals, resisted her claim upon the merits, and never questioned the power of the surrogate to try it. The same case on appeal may be found under the title of *Foster v. Hawley* (reported in 8 *Hun*, 68). Again, in the matter of the estate of John A. Merritt, who died intestate, leaving assets amounting to over \$1,250,000, the only question presented for determination was who were entitled to distribute shares, it being decided by this court which of the numerous claimants were, and which were not entitled to such shares. The power of the surrogate to determine was not questioned by any of the astute counsel engaged, nor was such an objection raised in the appellate courts, the case being reported in 14 *Hun*, 551 under the title of *Adee v. Campbell*, and also in 79 *N. Y.* 52. In *Hurtin v. Proal* (3 *Bradf.* 414) the right of the uncle to a distributive share was disputed and was determined by the surrogate. Like jurisdiction was exercised by him in the case of *Ferrie v. Public Administrator* (3 *Ib.* 151, 249; *S. C.*, 4 *Ib.* 28; affirmed by court of appeals, 23 *N. Y.* 90). The same may be said of the cases of *Hallett v. Hare* (5 *Paige*, 315, 1835), and *Rose v. Clark* (8 *Ib.* 574, 1841).

It is, perhaps, unnecessary to mention other cases in order to show that it was the uniform and unchallenged practice of surrogates under section 71, sanctioned by the superior courts, to hear and determine such questions. Now, as I understand the rule as to construction of statutes, it is that where the law is settled by adjudications giving it a certain construction or effect, a mere change of phraseology made in a ['] revision of it should not be deemed or construed as a change in the law, unless it evidently appears that such was the intention of the legislature (*Taylor v. Delancy*, 2 *Cai. Cas.* 743; *Goodell v. Jackson*, 20 *Johns.* 697, 722; *Matter of Brown*, 21 *Wend.* 316).

Estate of Orser.

It will be observed, in this connection, that the commissioner's notes to sections 2742,3 relate exclusively to the power of a surrogate to try a disputed claim against the deceased. No other meaning to the word "claim" is suggested, there or in the decisions.

Another rule as to construction is, that a long [and uninterrupted practice under a statute is regarded as good evidence of its construction (*Fort v. Burch*, 6 *Barb.* 60, 73, based upon 5 *Cranch*, 22).

It is quite apparent from the notes of the commissioner that the legislative intention was simply to conform the statute to the decision in the case of *Tucker v. Tucker* (*supra*), regarding a disputed debt. At most, there is nothing in the Code to forbid surrogates from deciding a controversy in regard to the title to, or any other question concerning a legacy or a distributive share, any more than there was in the Revised Statutes. It having, therefore, been the unbroken and unquestioned practice of the surrogates' courts for [] upwards of half a century to hear and determine such controversies, and the sections of the Code referred to having in no way circumscribed the power, its exercise by this court will be continued until it shall be otherwise instructed by an appellate tribunal. Hence I pass to the consideration of the other questions involved in this case.

The executor claims that he is a residuary devisee and legatee by virtue of the sixth clause of the will, which is as follows: "I give and bequeath to Isaac F. Brown and Margaret Miller the remainder of my estate, to be equally divided between them, of both real and personal," and that by virtue of this clause he is entitled, on this accounting, to one-half of the remainder of the fund, amounting to about \$6,000, after the payment of the debts and general legacies. This claim is resisted upon the ground that as he was one of the two witnesses to the will, residing in this State and com-

Estate of Orser.

petent to testify, without whose testimony the will could not have been proved, he is precluded from ['] taking any more than his distributive share of the personalty, or the share of the realty which would have descended to him in case the will had not been established (2 *R. S.* 65, sections 50, 51). These sections declare such a witness to be competent, and that he may be compelled to testify, so that other intended beneficiaries might not be deprived of what was sought to be given to them. I think the object of the law is twofold; first, to render the subscribing witness competent who would not have been so otherwise; and second, to guard against fraud in the preparation and execution of wills. The first is now perhaps obviated by recent statutes, but the latter remains. As the law now stands he is generally, as a party, a competent witness, but the effect as declared by section 51 is still the same, that section remaining unrepealed, and one of the reasons for its enactment still existing. Before the Revised Statutes were adopted, a devise to a subscribing witness to a will was wholly void (*Sharpsteen v. Tillon*, 3 *Cow.* 651), and such subscribing witness could not testify on the probate. The cases cited by the learned counsel for the executor do not seem to me to be in point.

It is, however, objected that this court cannot pass upon the question because it involves a construction of the will. Were the objection taken applicable, I should feel constrained to disregard it, for the reason that in most cases the court is compelled to construe wills in order that it may obey the directions of the statute to distribute the surplus remaining "to and among the creditors, legatees," &c., "according to their respective rights, and to determine to whom it is payable, and the sum to be paid by reason thereof," &c. But I do not deem this a case of construction at all. We are not here groping after the meaning of the

Estate of Orser.

testator, who has used language that is obscure. The court is simply asked to apply a plain provision of the statute, in order to determine to whom one-half of the residue of the personal estate of the deceased is to be paid. Applying this provision, it is determined that it must be paid to the next of kin of the testatrix, as prescribed by law for the distribution of intestates' estates, except that in such distribution the executor must be excluded, as he will already have received his full distributive share of the estate, as if she had died wholly intestate.

The executor's counsel insist that the will could have been properly proven without the testimony of Mr. Brown. In this I think they are mistaken. The law upon the subject will be found concisely stated in Redfield's second edition of the "Law and Practice of Surrogates' Courts," 202, et seq., and cases cited.

One William Orser died in 1864, leaving him surviving, as his only heirs-at-law and next of kin, six brothers and sisters, and leaving a will, in and by which, among other things, he directed the residue of his real and personal estate to be converted into money, and such money to be invested in good securities, for the benefit of his sisters, Deborah, Sarah, and Matilda, during their natural lives, each to receive an equal share of the interest accruing thereon; and failed to make any disposition of the remainder. On the accounting of this same Isaac F. Brown, the executor of that will, it was ascertained and decreed that the fund so created amounted to \$3,856.23, and the decree ordered the executor to invest it and divide the interest between the three sisters equally. Subsequently Sarah, one of the three, died, leaving a will, of which said Brown was also executor. On his accounting in her estate he charges himself with one-third of the \$3,856.23, as having received it, and the decree directed the balance of \$4,088.99, found to be in his hands, after

Estate of Orser.

the payment of all claims to be paid to him as her residuary legatee. That is presumed to have been done.

The question as to whether the provision for the three sisters, in William Orser's will, was in conflict with the statute against perpetuities, was not raised; no appeal was taken from either decree, and their provisions must therefore, in this proceeding, be regarded as binding upon the parties.

As by the decree in the William Orser estate the fund was to be invested and the income to be equally divided among the three sisters as provided by the will, they became tenants in common of the income, and the survivor or survivors could not take the share of the income of any one who might die, but each survivor could receive only her one-third (*Strong v. Strong*, 4 Redf. 376), and as by the decree in the Sarah Orser estate, the principal of the fund producing her income was directed to be paid to her residuary legatee, and as Matilda Orser, the only survivor of the three, is still entitled to the income of one-third, all that we have to deal with in this proceeding in this respect is the principal of the fund which produced the income of Deborah Orser. Her interest in it passed under her will, as it vested in remainder at once on his death in the next of kin of William, of whom she was one, and he, as to it, died intestate. Hence, it follows, that as Deborah left assets sufficient to pay all her general legacies, her claim on the fund as next of kin of William, with accrued interest, became a part of the residuum attempted to be given by her will to Isaac F. ['] Brown and Margaret Miller, which bequest as to Brown being, as we have shown, void, except that he may take the share of her estate to which he would have been entitled had she died intestate (2 R. S. 65, § 51 and *Code Civ. Pro.* § 1868). The residue, including interest from Deborah's death, must be equally divided

Estate of Orser.

among the other next of kin of the testatrix as provided by the statute of distributions. This fund came into the hands of the executor of William Orser, and as it, on Deborah's death, became a claim in his hands, as her executor, against the estate of William, he must be regarded as having collected it and as now holding it as her executor.

I think the executor is chargeable with interest on the moneys drawn out of the savings' banks and deposited with his own funds at the Sing Sing National Bank, except on the sums paid out as legacies. He supposed himself entitled to one-half of the residuum, and acted innocently in the matter, but that will not excuse him from liability for interest to those having a legal right to it; but I think it should be reckoned now at the rate of four per cent. only.

The executor, not being very accurate in the use of words, seems to have called legacy "dower" in the vouchers he took when he paid legacies. I am, therefore, inclined to receive them as sufficient; and, also, to allow the payment made to the guardian of the Finch children. If there is anything still due on account of the remainder of the dower interest of Rubama Brown, deceased, the executor is still liable for it to him.

I do not regard the fact of the statute rendering ['] the bequest to Brown void, by reason of his being a witness to the will, as in any manner affecting the bequest to Margaret Miller. The will is to be regarded as if the one half of the residuum were given to her and the other half left undisposed of. Such seems to me to be the effect of the statute. There can be no difficulty in making the separation.

Thus the chief questions arising in the case are disposed of. Any others that may have been overlooked will, on attention being called to them, be disposed of

In re Bailey.

on the settlement of the decree, of which at least four days' notice should be given.

Costs of all parties to be paid out of the fund.

IN RE BAILEY, RECEIVER, ETC., OF THE PELHAM &
PORTCHESTER RAILROAD COMPANY.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK
COUNTY, SPECIAL TERM, OCTOBER, 1883.

§ 66.

Attorney's lien for costs.—When attorney's right to costs absolute and not to be defeated by payment to judgment creditor.*

Where a railroad company was declared insolvent and a receiver thereof was appointed pending an action against it in which judgment was thereafter recovered in favor of the company for costs and disbursements, and one Pool, who as attorney for the company recovered said judgment, gave notice to the plaintiff's attorneys in the action in which the judgment was recovered, that he had a lien upon said judgment for his costs therein, and that the amount of the judgment be paid to him, and the plaintiff notwithstanding said notice paid the amount of the judgment to the receiver,—*Held*, on a motion by the receiver to be allowed to withhold the sum so paid from said Pool and that the sheriff be directed to return an execution issued by said Pool upon said judgment, as satisfied, upon his fees being paid, that said Pool had a lien for his costs against the railroad company, and the company, if not dissolved, could not deprive him of them or receive them of the other party to the action who was adjudged to pay them, after notice of the attorney's lien, to the deprivation of the attorney who recovered them; [1] that no notice or other step was necessary upon the part of the attorney to create his lien; and his right to the costs was substantial and absolute after notice; [2] that

* See *In re Wilson & Greig*, 2 *N. Y. Civ. Pro.* 843; *Dimick v. Cooley*, 3 *Id.* 141; *Moloughney v. Kavanaugh*, 3 *Id.* 258; *Albert Palmer Co. v. Van Orden*, *ante*, p. 44.

In re Bailey.

the receiver had not any title, either legal or equitable, to the costs; ['] that he took the same title the corporation had in its lifetime, and took that by transfer, and could have no better right than the corporation would have if alive.['] Also *Held*, that it was competent and proper for the court to order the receiver to pay the costs he had received, with the interest thereon from the time he received them, to the attorney for the railroad company ['] and also to allow the sheriff to proceed under the execution issued to him by said attorney and collect his fees upon the amount of the judgment, and interest. [']
(Decided October 24, 1888.)

Motion by petitioner, that an execution on a judgment in favor of a railroad company of which he was receiver be returned as satisfied upon payment of the sheriff's fees thereon and that he be allowed to retain the money paid him in satisfaction of said judgment.

The opinion states the facts.

William E. Walkley, for petitioner.

Harwood R. Pool, in person, opposed.

POTTER, J.—This is a motion, upon petition, that Joseph Pool show cause why the sheriff should not return an execution issued to him by said Pool, as attorney for the above railroad company, as satisfied, when the sheriff's fees thereon are paid, and why the petitioner should not be allowed to retain the sums that he has received upon the judgment (being the full amount thereof) on which said execution was issued.

From the papers presented by the petition of the receiver, and the affidavits, it appears that one Gildersleeve brought an action against the Pelham and Portchester Railroad Company, and Mr. Pool was employed by the defendant to defend said action, and did so successfully; the result being that said company recovered a judgment against the plaintiff in the action for the costs for the services which Mr. Pool rendered in the

In re Bailey.

action, and his disbursements, in behalf of the company.

During the pendency of the action and before the trial thereof, or the recovery of said judgment, the company was declared insolvent, and the petitioner was appointed its receiver.

The judgment for costs and disbursements was entered up by Mr. Pool on June 9, 1883, and upon June 14 following said Pool gave notice in writing to the plaintiff's attorney, in the action in which the judgment was recovered, that he had a lien upon said judgment for his costs therein, and that the amount of said judgment be paid to him, and on June 26 issued an execution upon said judgment to the sheriff to collect the same. Nevertheless, the plaintiff in said action paid the amount of said judgment to said receiver, who now asks the court by said petition to be allowed to withhold the same from said Pool, and that the sheriff be directed to return said execution upon being paid his fees.

The receiver takes the position that he has a right to said costs by virtue of his appointment as receiver, superior even to the right of the attorney who rendered the services and advanced the money for which the judgment for costs was rendered. The receiver, in order to make his right to said costs appear more unqualified and absolute, sets forth in his petition that he had no contract or understanding with said Pool during the pendency of said action, or at any other time. By this, I suppose, is meant that he did not, as receiver, recognize said action, or Mr. Pool as his attorney in conducting the same, and so Mr. Pool can have no claim, legal or equitable, against the receiver for his services. If that is so, it can only go to intensify the absence of any equity in the claim that the receiver now makes, to have said costs at the expense of the person who earned them. There are some other notable feat-

In re Bailey.

ures in the transactions of the receiver and other parties in this matter, but, as they are of no importance in the view I entertain of the question presented, I refrain from alluding to them particularly.

The attorney of the railroad company had a lien for his costs against the company, and the company, ['] if not dissolved, could not deprive the attorney of them or receive them of the other party to the action who was adjudged to pay them after notice of the attorney's lien to the deprivation of the attorney who recovered them. No notice or other step was ['] necessary upon the part of the attorney to create his lien. His right to those costs was substantial and absolute, after notice. The courts always have protected the attorney's lien for costs in a judgment upon motion to set off reciprocal judgments between the parties to the action in which such judgments were recovered, whether for costs and damages or either.

I have failed to perceive any title to the costs in ['] question, legal or equitable, that the receiver can maintain. We have seen the railroad company itself, if still in existence, could not, as against its attorney, hold these costs. Certainly the receiver of a dead corporation can have no better right than the corporation would have, if alive. The receiver takes the same ['] title the corporation had in its lifetime, and takes by transfer. When the corporation ceased to be, there was no judgment in its favor against Gildersleeve, who brought his action against it ; no right to any costs had been established or adjudged in favor of the corporation when it ceased, or made a transfer of its assets to the receiver. This was never an asset of the corporation. It was the judgment that was rendered after its dissolution that created these costs. Where and how did the receiver become the owner of this judgment for costs, or become entitled to receive these costs, especially as against Mr. Pool, the attorney ?

Skoon v. N. Y. Novelty Co.

This motion must be denied, with ten dollars costs, to be paid by the receiver; and as he is before the court by petition, asking to have his right to the costs he has received established, I think it proper and competent for the court, in disposing of this matter, to

['] order the receiver to pay the costs he has received, with the interest thereon from the time he received the same, to Joseph Pool, Esq., the attorney of the railroad company, upon service upon the receiver of a copy of the order to be entered herein; and further

['] that the stay of the sheriff from collecting the said execution be vacated and the sheriff be allowed to proceed thereunder and collect his fees upon the amount of the judgment and interest.

SKOOG v. NEW YORK NOVELTY COMPANY.

CITY COURT OF NEW YORK, SPECIAL TERM, OCTOBER,
1883.

§§ 451, 723.

Amending summons.—When summons may be amended by inserting real names of defendants in place of name under which they did business.

Where certain persons were doing business under the name of "The New York Novelty Company," and service of the summons, in an action in which "The New York Novelty Company" was named as defendant, was made on such persons,—*Held*, that a motion to amend the summons by inserting the names of such persons as defendants in place of The New York Novelty Company should be granted; that although it was alleged in the complaint that the defendant was a corporation, and was sued as such, it must be held that they were sued in that name; that if there were a corporation doing business under the name of The New York Novelty Company, the motion could not be granted; also *Held*, that while it is true that the

Skoog v. N. Y. Novelty Co.

name of one person cannot be stricken out and that of another inserted, the case at bar presents no such question.

(Decided October 28, 1888.)

Motion to amend the summons in this action by inserting the names of Gabriel Schwab and others as defendants in place of The New York Novelty Company.

Gabriel Schwab and others were doing business in the city of New York as copartners under the firm name of The New York Novelty Company. The plaintiff brought this action, naming The New York Novelty Company as defendants and serving the summons on said Schwab and his copartners.

The contract upon which this action was based was made by the plaintiff with The New York Novelty Company; and from the terms of the contract the plaintiff supposed that the defendants were a corporation, and sued them as such, and alleged in his complaint that it was a corporation. The defendants interposed an answer wherein they alleged that they were not and never had been a corporation, but that the name, The New York Novelty Company, was the name under which certain persons composing the firm of Gabriel Schwab & Brothers transacted their business. Thereupon the plaintiff made this motion.

J. Edward Swanstrom, for motion.

David Tim, opposed.

HAWES, J.—The motion to amend by inserting the names of Gabriel Schwab and others in place of The New York Novelty Company should be granted. It is true that the defendant is alleged to be a corporation, and is sued as such, but service was made upon Gabriel Schwab and others, whose names plaintiff desires to insert. It appears that these persons are doing busi-

Werckman v. Werckman.

ness under the name of The New York Novelty Company, and it must be held that in that name they were sued. If there was a corporation doing business under the name of The New York Novelty Company then I do not think that the court could allow the amendment, as the case would fall within the ruling of the case of New York State Monitor Milk Pan Ass'n v. Remington Agricultural Works (89 N. Y. 23). The suit, however, is brought against the real parties under their partnership name, for in truth there is no The New York Novelty Company except as it represents the real defendants; and section 723 of the Code allows in terms the correction of a mistake in the name of a party. (See, also, Newton v. Milleville Manufacturing Co., 17 Abb. Pr. 318; Bank of Havana v. Magee, 20 N. Y. 355.) It is very true that the name of one person cannot be stricken out and that of another inserted, but the case at bar presents no such question.

Motion granted.

WERCKMAN v. WERCKMAN.

SUPREME COURT, FOURTH DEPARTMENT, ONEIDA
COUNTY SPECIAL TERM, AUGUST, 1883.

§§ 131, 132.

Sentence to State prison for a term less than life does not deprive the prisoner of the right to defend an action brought against him.

Although a sentence to imprisonment in States Prison for a term less than life suspends the right of the prisoner to sue, it does not protect him from being sued; and express provision is made, by section 132 of the Code of Civil Procedure, for the service of process upon him. This liability to be sued necessarily implies the right to defend; and if it is a civil right, within the provisions of the Revised Statutes

Werckman v. Werckman.

[2 R. S. 701, § 19,] that such sentence suspends all the civil rights of the prisoner, it must be deemed to have been excepted by the Code from their operation.

(Decided September 8, 1883.)

Motion for judgment against the defendant.

The facts are stated in the opinion.

R. O. Jones, for the motion.

VANN, J.—Motion for judgment against the defendant, without notice to his attorneys, on the ground that by his sentence to imprisonment in a state's prison for a term less than life, all his civil rights are suspended, including the right to further defend this action until such term shall have expired. Motion denied. *Held*, that although, under the Revised Statutes (3 R. S. 2538, § 19*), such a sentence suspends the right of a prisoner to sue, it does not protect him from being sued; that by the Code express provision is made for the service of process upon him (*Code Civ. Pro.* § 132); that the liability to be sued, of necessity, implies the right to defend, and that if the right to defend is a civil right within the meaning of said provisions of the Revised Statutes, it must be deemed to have been excepted by the Code from their operation.

* Banks' 7 ed.; same statute, 2 R. S. 701, § 19.

Hall v. United States Reflector Co.

HALL ET AL. v. THE UNITED STATES REFLECTOR COMPANY.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK
COUNTY SPECIAL TERM, OCTOBER, 1883.

§§ 14, 15, 709, 1241, 3256, 3307.

The practice as to the payment of sheriff's fees and charges upon an attachment and the reimbursement of the party paying them, stated.—

When motion to compel sheriff to deliver to defendant attached property upon vacation of attachment will be denied.— When motion to punish party for failing to pay costs, etc., of attachment, as required by order of court, will be denied.— Whether court has power to fix amount of sheriff's fees on attachment or determine who shall pay them, quare.

The fees and charges of the sheriff for executing a warrant of attachment are to be included in the judgment in favor of the party to whom costs in the action are awarded, and collected as part of the costs of the action. [1] If the attachment remains in force throughout the action, the sheriff will sell the property, either under the attachment or execution, and retain his fees and charges out of the proceeds of the sale. [1] If the warrant of attachment vacated, or annulled, or discharged, the sheriff is required to deliver the property to the defendant, or the person entitled thereto, upon reasonable demand, and the payment of all costs and charges and expenses legally chargeable by him. The fees, etc., thus paid by the defendant will be included in a judgment for costs in the action, if the defendant be awarded them, and collected from the plaintiff by execution, or by an action upon the undertaking given upon the issuing of the attachment; and likewise out of the undertaking if the defendant pays the sheriff's fees, etc., but is not awarded costs of the action. [2]

Where a defendant moved for an order requiring the sheriff to return attached property to him upon the vacation of the attachment, without payment of his fees, etc., and it appeared that the defendant's

Hall v. United States Reflector Co.

assignee had theretofore brought an action for conversion by the sheriff of the same property, founded on his refusal to deliver it, *Held*, that the motion should be denied. [3]

Where a plaintiff, upon the vacation of an attachment, was ordered to pay the fees, etc., of the sheriff for executing the attachment, and he failed to do so,—*Held*, that a motion to punish him as for a contempt in failing to do so should be denied [4]; that the question of the right to issue a precept against the body in such case was too uncertain to warrant or justify such process. [4] Also,—*Held*, that the fact that an action had been brought by the sheriff against the plaintiff, the defendant, and the defendant's vendee, to procure a judgment adjudging that the attached property be sold to pay his fees and charges and against the plaintiff in the attachment suit for any deficiency arising on such sale, was another and sufficient reason for denying the motion. [4]

It is competent for the judge issuing an attachment to allow the fees and charges of the sheriffs thereon, but *quære* whether the court has the power to fix those fees and charges, or determine who shall pay them, upon motion or by order.

(Decided October 20, 1883.)

Motion by defendant (1) that the sheriff be required to deliver to it property seized under an attachment, now vacated, without payment of his fees, etc., and (2) for a precept against the persons of the plaintiffs, to punish them as for a contempt in failing to pay such fees, etc., as directed by the order of the court vacating the attachment.

At the commencement of this action the plaintiffs procured the issuing of a warrant of attachment under which the sheriff of the city and county of New York attached certain machinery, gas fixtures, and other property. The attachment was subsequently vacated by an order of the court, which also fixed and determined the amount of the sheriff's fees and charges, and directed that the plaintiff pay the same. This the plaintiff failed to do, and the sheriff refused to deliver the attached property, either to the defendant or to a

Hall v. United States Reflector Co.

person to whom the defendant had assigned it, until his fees, etc., were paid.

The defendant's vendee thereupon brought an action against the sheriff to recover damages for a conversion of the property in failing to deliver it upon demand. The sheriff, also, brought an action against the plaintiffs, the defendant, and the defendant's vendee, to procure a judgment decreeing a sale of the property to satisfy and pay his said fees and charges and against the plaintiff herein for any deficiency arising on such sale.

These motions were made thereafter, and during the pendency of said actions.

Edward P. Wilder, for the defendant and motion.

Chamberlain, Carter & Hornblower, for plaintiffs, opposed.

Charles F. MacLean, for the sheriff, opposed.

POTTER, J.—There are two motions made by the defendant in this action; one to punish plaintiffs for contempt by arrest and imprisonment, under an attachment, for failure to pay the fees and charges of the sheriff, as fixed and allowed by the order of this court, June 1, 1883, upon an attachment issued in this action; and the other to direct the sheriff to surrender and deliver the property of the defendant taken by the sheriff under said attachment.

I have come to the conclusion that both motions should be denied. The law gives the sheriff certain specified fees for serving an attachment, and also provides that the judge issuing the attachment shall allow the sheriff additional compensation for his services and trouble in taking possession of and preserving the property. The fees and charges are to be included ['] in the judgment in favor of the party to whom

costs in the action are awarded (§ 3256, Code Civ. Pro.), and collected as part of the costs in the action. If the attachment remains in force throughout the action, the sheriff will sell the property, either under the attachment or execution, and retain his fees and charges out of the proceeds of the sale.

If the warrant of attachment is vacated or annulled, or discharged, the sheriff is required to deliver the ['] property to the defendant, or the person entitled thereto, upon reasonable demand, and upon payment of all costs and charges and expenses legally chargeable by the sheriff (*Code Civ. Pro.* § 709). The fees and charges thus paid by the defendant will be included in a judgment for costs in the action, if he be awarded costs of the action, and be collected of the plaintiffs upon the execution against the plaintiffs, or by an action upon the undertaking given by plaintiffs upon issuing the attachment; and likewise out of the undertaking if the defendant pay the sheriff's fees, under section 709, in case the defendant is not awarded costs of the action.

It seems to me that this is the scheme provided by the Code for the payment of the sheriff's fees and charges upon an attachment, and for the reimbursement of the party paying them. This scheme protects the sheriff in any event of the action, or of the warrant of attachment, and is the only one that will suffice for that purpose, and is an amendment and improvement of the former statutes for that reason. But if this view is not correct, I should not be disposed to grant an order directing the sheriff to deliver the property attached to the defendant or his vendee, for the reason that an action has been commenced by him, and is still pending, to recover the value of this property of the sheriff, as for a conversion of it by the latter, in refusing to deliver it until his fees and charges were paid.

Hall v. United States Reflector Co.

The defendant or his vendee has elected that mode of testing the right of the sheriff to retain the property until his fees and charges are paid, and I think it was the best and wisest way of determining that question, and am not disposed to interfere with the mode selected by him. This motion should therefore be denied, with costs.

In regard to the motion to punish the plaintiffs for contempt in not paying the costs ordered to be paid by plaintiffs to the defendant, under the order of June 1, 1883, I think there is too much doubt in relation to the law to warrant or justify me in signing an order to arrest and imprison the plaintiffs. It is a harsh and severe remedy and should not be resorted to or applied except in a clear case. Sections 14, subd. 3 and 15, and 1241 of the Code of Civil Procedure, upon the subject of contempts and arrests for the non-payment of money, leave the question of the right to issue a precept against the body in this case too uncertain to warrant or justify such process.

But there is another source of doubt in this case. I am not satisfied that the court has the power to make the order for non-compliance with which the party is sought to be put in contempt. It was competent for the judge issuing the attachment to fix and allow the fees and charges of the sheriff upon the attachment, under section 3307.* I am not satisfied that the court has the power to fix those fees and charges, or that the court has the power to determine who shall pay those fees and charges, upon motion or

* An order fixing the compensation of a sheriff for his trouble in taking possession of and preserving property attached is in the discretion of the judge granting the attachment, and cannot be reviewed in the court of appeals. *German American Bank v. The Morris Run Coal Co.*, 74 N. Y. 58.

Hall v. United States Reflector Co.

by an order, or otherwise than as prescribed by the scheme of the Code as above outlined.

But another and sufficient reason for denying this motion is to be found in the fact that the sheriff has commenced an action, which is now pending, against the plaintiffs and defendant and the defendant's vendee, to determine the questions involved in both motions as to the liability of the parties or either of them to pay his fees and charges, and in what proportion and to what extent, and whether he has a right to ['] retain the attached property until such fees and charges are paid. These questions can be much more satisfactorily determined by an action than by these motions. In an action, all parties can be heard and all questions presented at the same time, and one judgment rendered, embracing all the questions in dispute between the various parties. I therefore deny the motion to punish for contempt, but without costs, as the action of the defendant was based upon an order of the court.

Bowe v. United States Reflector Co.

**BOWE v. THE UNITED STATES REFLECTOR
COMPANY ET AL.**

**SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM,
OCTOBER, 1883.**

§§ 709, 1737, 1739.

Sheriff has lien upon attached property for his fees, etc., after vacation of attachment, and is not obliged to deliver it to defendant until they are paid. May bring action to procure a sale of the attached property in satisfaction of such lien.

The sheriff has a right to his costs and fees for executing an attachment, notwithstanding it has been set aside; and until they are paid he is not obliged to deliver the property to the defendant. This amounts to a lien in his favor upon the goods attached for the amount of his fees, and an action to enforce such lien by a sale of the property is proper.

Where a warrant of attachment was vacated and the plaintiff was directed by an order of the court to pay the sheriff's fees, etc., but failed to do so, and the sheriff, claiming a lien upon the attached property for his fees, charges, etc., refused to deliver it to the defendant or his assignee until they were paid, and brought an action against the plaintiffs and defendant in the attachment, and the person to whom the defendant assigned the property; and in his complaint therein set forth these facts, and asked judgment directing a sale of the attached property in satisfaction of his lien for fees, etc., and the expenses of keeping the property after the taxation of his fees, and for the deficiency, if any, against the plaintiffs in the attachment suit, and the complaint was demurred to on the grounds that it did not state facts sufficient to constitute a cause of action, and that there was a misjoinder of parties defendant, and that there was an improper joinder of cause of action: *Held*, that plaintiff, should have judgment on the demurrer.

(Decided October 30, 1883.)

Demurrer to the complaint by the defendant, the United States Reflector Company; and another by the defendant, William Corbit.

Bowe v. United States Reflector Co.

The plaintiff brought this action as late sheriff of the city and county of New York to procure a judgment decreeing that certain personal property attached by him under a warrant of attachment which had before the commencement of this action been vacated, be sold, and that out of the proceeds he be paid the sum of \$5429.38, balance due on account of his fees, etc., for executing said warrant of attachment and interest thereon, and the expense of keeping the attached property since his fees, etc., were taxed, and that he have judgment against the defendants, Hall, Nicoll and Granbery, who were plaintiffs in the attachment suit, for any deficiency that may remain after application of the proceeds of said sale in payment of said amount and for the costs of this action.

The complaint shows that the plaintiff was from January 1, 1880, to December 31, 1882, sheriff of the city and county of New York, duly elected, qualified and acting as such; that the defendant, the United States Reflector Company, is a corporation created, organized and doing business under the laws of the state of Connecticut; that on or about the fourth day of May, 1881, in a certain action then pending and undetermined in the supreme court, wherein the defendants, Hall, Nicoll and Granbery, were plaintiffs, and the defendant, the United States Reflector Company, was defendant, brought to recover \$25,736.67 for alleged breach of contract, a warrant of attachment against the property of the defendant, the United States Reflector Company, was duly granted and issued to this plaintiff as sheriff; that in pursuance thereof the plaintiff levied upon and attached certain property of the defendant enumerated in a schedule annexed to the complaint, and continued to keep it under the attachment; that on May 3, 1883, the plaintiffs in the attachment served a notice releasing the attachment as to certain of the property, except for the purpose of satisfying plaintiff's

Bowe v. United States Reflector Co.

lien for charges and expenses; that by an order of the court entered May 5, 1883, the attachment was vacated conditionally upon Hall, Nicoll and Granbery's, within five days after service of the order, refusing to give further security; that they failed to give the security, and on June 1, 1883, another order was made taxing the sheriff's fees and directing the delivery to the defendant of the attached property upon payment to him of said fees; that he had in the execution of the writ incurred heavy expenses, principally for rent of the places in which the attached property was kept, under an agreement with the parties and at their request; that about November 15, 1883, these fees and expenses were taxed at \$7224.58, less the sum of \$3632.50; theretofore paid, leaving the sum of \$3592.08 then due, and after the failure of the plaintiffs in the attachment to give additional security, they were again taxed at the sum of \$5609.78, less \$180, theretofore paid by plaintiff, leaving then due \$5429.78, which included the balance due upon the former taxation; that by agreement of the parties the property was to remain at No. 4 Great Jones street, in this city, until finally disposed of, and the rent was and is to be treated as an expense of the sheriff; that the property still remains at that place; that the plaintiff has and claims a lien upon the property for his expenses; that pending the attachment the defendant, Corbit, acquired or claims to have acquired some interest in the property which is subject to the plaintiff's lien, and that plaintiff has demanded the amount of his fees and expenses from the defendants, but they have each of them refused to pay the same or any part thereof.

The defendants, The United States Reflector Company, demurred to the complaint on the grounds, (1) that it does not state facts sufficient to constitute a cause of action; (2) that there was a misjoinder of par-

Bowe v. United States Reflector Co.

ties defendant, and (3) that there was an improper joinder of causes of action.

The defendant, Corbitt, demurred on the first ground alone, and the defendants Hall, Nicoll & Granbery, answered.

Edward P. Wilder, for demurrer of the defendant, The United States Reflector Company.

William Arrowsmith, for demurrer of the defendant, William P. Corbitt.

Charles F. MacLean and *Malcolm Graham* (*Charles F. MacLean*, attorney), for the plaintiff, opposed.

VAN VORST, J.—There must be judgment for the plaintiff on the demurrer. Section 709 of the Code of Civil Procedure recognizes the sheriff's right to his costs and fees, notwithstanding the attachment has been set aside; and until paid, he is not obliged to deliver the property to the defendant. This amounts to a lien in his favor upon the goods attached for the amount of his fees.

The action is therefore proper to enforce his lien by a sale of the property, for otherwise the expense of detaining it, together with his fees, would exceed the value of the property.

Judge POTTER has had the subject lately under consideration in a controversy between these parties, and by his opinion, a copy of which has been handed up, he expresses the views substantially above mentioned.*

There must be judgment for the plaintiff on the demurrer with liberty to defendants to answer on payment of costs.

* The opinion here referred to was written in the case of *Hall v. The U. S. Reflector Company*, and is reported *ante*, p. 148.

Smith v. Davis.

SMITH v. DAVIS, IMPLEADED, ETC.

SUPREME COURT, FOURTH DEPARTMENT, ONEIDA
COUNTY SPECIAL TERM, AUGUST, 1883.

§§ 484, 488.

*Foreclosure of mortgage—Prior mortgages properly made defendant in
action for, to determine amount due on his mortgage.*

In an action for the foreclosure of a mortgage a prior mortgagee, although not a necessary, is a proper party defendant for the purpose of ascertaining the amount due on his mortgage.
(Decided September 8, 1883.)

Demurrer to complaint by defendant Fannie E. Davis on the ground that it does not state facts sufficient to constitute a cause of action against her.

The facts are stated in the opinion.

R. O. Jones, for demurrer.

M. V. B. McGraw, for plaintiff, opposed.

VANN, J.—Demurrer to a complaint for the foreclosure of a mortgage upon the ground that no cause of action is alleged against Fannie E. Davis, a prior mortgagee, who, according to the complaint, was made a defendant for the purpose of ascertaining the amount due her, and in order that she could be first paid from the proceeds of the sale.

Demurrer overruled with costs, but with leave to answer upon the usual terms.

Held, that Fannie E. Davis although not a necessary was a proper party for the purpose of ascertaining the

Broadwell v. Holcombe.

amount due on her prior incumbrance.* With that fact settled by a decree binding all of the parties, purchases, could bid more intelligently, and the premises would be more likely to sell for their real value.

BROADWELL v. HOLCOMBE.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM, SEPTEMBER, 1883.

§§ 2260, 2263, 2265.

Summary proceedings—When execution of warrant in, will not be enjoined, except in case where proceedings on judgment in action of ejectment would be.—Giving of collateral security does not necessarily prevent enforcement of original undertaking.

The granting of an injunction in an action brought against a landlord to stay the execution of a warrant in summary proceedings, after final judgment, is confined to the cases and conditions in which an

* In *Brown v. Volkening* (64 N. Y. 76) it was held that one asserting a right under a mortgage prior to a mortgage which an action was brought to foreclose, was a proper party to the action, and the question of priority was a proper one to be determined in it. See also *Hancock v. Hancock*, 23 N. Y. 563; *Western Ins. Co. v. Eagle Fire Ins. Co.*, 1 Paige, 284; *Holcomb v. Holcomb*, 2 Barb. 20; *Bank of Orleans v. Flagg*, 3 Barb. Ch. 816; *Vanderkemp v. Shelton*, 11 Paige, 28; but see *McReynolds v. Munn*, 2 Keyes, 214. In *Emigrant Industrial Savings Bank v. Goldman* (75 N. Y. 127) ; it was held that in an action for the foreclosure of a mortgage the plaintiff may make prior incumbrancers parties for the purpose of having the amount ascertained, and paid out of the proceeds ; but that so far as mere legal rights are concerned the only proper parties to such an action are the mortgagee, the mortgagor and those who have acquired rights under them subsequent to the mortgage ; and that these parties only are affected by the judgment. See *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 635 ; *Frost v. Koon*, 80 N. Y. 428 ; *Lewis v. Smith*, 9 Id. 502 ; *Corning v. Smith*, 6 Id. 82 ; *Bank of Orleans v. Flagg*, *supra* ; *Bache v. Doscher*, 67 N. Y. 429.

Broadwell v. Holcombe.

injunction might be granted to stay the execution of a judgment in an action of ejectment. [1]

The proceedings of a landlord in summary proceedings to recover the possession of real property will not be enjoined in an action brought against him, after judgment in the summary proceedings in his favor, when the questions involved can be determined at law [2] or when the grounds relied upon for an injunction would be equally available if urged as a defense to the summary proceedings; [2] but when the landlord is making an oppressive use of the judgment, [2] or his title to the premises has terminated; [4] or the tenant has, subsequent thereto, acquired some interest or equity in the subject-matter which should be protected; [4] or when the judgment was procured by fraud or collusion; [4] or if the justice goes beyond his jurisdiction either in taking cognizance of the proceeding or while he is acting in it the court may doubtless restrain him. [1] So also, *it seems*, that it might do so, if it appeared that the tenant had equities which the justice could not protect. [3]

Where in an action to procure an injunction restraining the execution of a warrant issued in summary proceedings brought by the defendant as landlord against the plaintiff as tenant, the defendant asserted that in April, 1833, he rented the premises in question to the plaintiff for the term of one year under a verbal contract, which provided, among other things, that the rent was to be paid monthly in advance, and for the giving of security therefor; and it appeared that subsequently one Robert Bruce, who, plaintiff claims was her agent, assigned a certain pool receipt for stock to defendant, and he gave a receipt in which he agreed to hold it "as collateral security" for the rent, and that no sale or disposition of the pool receipt should be made until the first day of May, 1884.—*Held*, that such security was in pursuance of the previous agreement, and was not the original but a collateral undertaking and obligation; [6] that by it the landlord did not waive either the payment of the rent in advance or his right to invoke his remedies under the statute in case of a failure to pay the rent when due. [4] Also *Held*, that in any event, the questions before the justice were legal, and as such were within the jurisdiction of the justice to decide, [8] and that the N. Y. superior court had no supervisory power over his judgment, or to review it, or supersede its execution in such suit. [5]

If there is any error in summary proceedings to recover possession of real property before a justice, who has jurisdiction of them, or in his decision, it can be corrected only on appeal [8, 9] and if his decision should be ultimately reversed, the tenant's remedy under the Code is by an action for damages. [9]

A collateral security does not necessarily suspend legal efforts and

Broadwell v. Holcombe.

remedies to enforce the principal undertaking, according to its terms, until it is fully satisfied; and when that is accomplished the security should be given up. [']

Chadwick v. Spargur (1 *N. Y. Civ. Pro.* 422); [',⁵] *Knox v. McDonald* (25 *Hun.* 268), ['] approved and followed.

(*Decided September 26, 1883.*)

Motion by plaintiff to continue a temporary injunction restraining the issuing of a warrant in summary proceedings.

This action was brought, among other things, to enjoin the execution of a warrant issued in summary proceedings to recover the possession of real property, brought by the defendant against the plaintiff. The plaintiff asserts that one Robert Bruce was her agent in and about the renting of a certain premises known as No. 54 East Twenty-fifth Street, in the city of New York; that on May 1, 1883, she rented said premises, by an instrument of which the following is a copy.

"P. O. Box 1491, New York, May 1, 1883.

"Received of Robert Bruce a pool receipt of Wells, Fargo & Co., calling for twenty shares of United Globe Electric Light Company stock of the par value of \$2000 upon the first day of May, 1884, which I agree hereby to hold as collateral security for the payment of \$1200 rent from Mrs. A. A. Broadwell, of and for the premises No. 54 East Twenty-fifth St.; and I hereby agree to deliver said receipt to said Robert Bruce upon the expiration of one year from to-day, provided said rent is fully paid by Mrs. Broadwell to me on the first day of May, 1884, and in case of default in said payment, then this stock shall be used to defray the difference, of said rent due by Mrs. Broadwell, and any excess shall be paid to said Robert Bruce or order; but no

Broadwell v. Holcombe.

sale or disposition shall be made of this pool receipt until the first day of May, 1884.

“Wm. Fred. Holcombe.

“Witness: Robert Bruce.”

The plaintiff claims that the understanding at the time this receipt was given was that she should pay the rent as she was able, and that this security was given so that she should, in any event, have possession of the premises until May 1, 1884.

The defendant denies that Robert Bruce was plaintiff's agent, and alleges that he was a guarantor or surety only. He also states that on May 17, 1882, he rented the premises in question, of which he was then and is now the owner, to plaintiff, under a written lease. for eleven months from June 1, 1882, at a rental of \$225 per month, payable monthly in advance; that she agreed to board him and his family, and he agreed to credit her therefor with \$125 per month on account of the rent; that on or about April 14, 1883, the defendant requested him to rent her said premises for one year from May 1, 1883, for board of himself and family and \$100 per month, and he agreed to do so if she would pay rent for three months in advance, viz., for May, June, and July, 1883, and give good security for the payment of the rent, which was to be paid in advance; that she promised to do so, and give him \$100 in cash for the May rent, and a due-bill, of which the following is a copy:

“Due Dr. W. F. Holcombe on May 1, 1883 (\$200.00) two hundred dollars for rent of house No. 54 East Twenty-fifth St., for the months of June and July 1883, as per agreement between us.”

“New York, April 14, 1883.

Robert Bruce.”

He also alleges that said due-bill was not paid;

Broadwell v. Holcombe.

that the rent for June, July, and August, has not been paid, although duly demanded; and that he therefor brought summary proceedings to dispossess her for such non-payment of rent in the Sixth District Court in the city of New York, in which a trial was had in August, 1883, and a judgment rendered in his favor August 28, 1883.

The plaintiff, in affidavits used on this motion, denies the making of the agreement alleged by defendant to have been made on May 14, 1883, and asserts that the \$100 was paid and the due-bill given as an accommodation to the defendant.

Pierre C. Talman, for the motion.

John F. Baker, opposed.

VAN VORST, J.—The Code of Civil Procedure gives an ample remedy for the review of the proceedings upon a summary application by a landlord for the removal of his tenant for non-payment of rent; formerly by certiorari, it is now by appeal (section 2260).

And section 2261 declares that the issuing of the warrant cannot be stayed by such appeal or the giving of an undertaking thereunder otherwise than is provided for in section 2262. In the county of New York, however, the execution of the warrant will not be stayed by the appeal or the proceedings thereunder (section 2262).

Section 2263 gives to the person dispossessed a remedy by action for the recovery of the damages which he may have sustained by the dispossession, if the final order is reversed upon the appeal.

Section 2265 provides that, if the final order awards delivery of the possession, the issuing or execution of the warrant therefor cannot be stayed or suspended

Broadwell v. Holcombe.

by any court or judge except in one of the following methods:

1. By an order made, or an undertaking filed, upon an appeal in a case, and in the manner specially provided for that purpose.

2. By an injunction order granted in an action against the petitioner (*i. e.*, the landlord) . . . "after the final judgment, except in a case where an injunction would be granted to stay the execution of the final judgment" in an action of ejectment, and upon like terms.

We have here a full scheme, with specific regulations, controlling these summary proceedings, and which gives the only method of a review of the same, and it limits the cases and conditions upon which an order of injunction may be granted to stay the execution of the warrant after final judgment. This latter ['] remedy is confined to cases and conditions in which an injunction might be granted to stay the execution of a judgment in an action of ejectment. In order, therefore, to determine the plaintiff's right to a remedy by injunction, we must consider in what cases, and for what reasons, it might be invoked to stay the execution of a judgment in ejectment.

In *Chadwick v. Spargur* (1 *N. Y. Civ. Pro.* 422), we have it stated—"The proceedings of the plaintiff ['] in an action of ejectment will not be enjoined when the questions involved can be determined at law, or when the the ground relied upon for an injunction would be equally available if urged as a defense to the action. If the questions raised by the answer in ['] the proceeding are within the jurisdiction of the Justice to decide, the question of the correctness of his ruling must be raised by appeal" (*Jessurun v. Mackie*, 24 *Hun*, 624 627).

In *Knox v. McDonald* (25 *Hun*, 268), *HARDIN, J.*, in an opinion at General Term, says, in substance,

Broadwell v. Holcombe.

['] that injunctions are granted after final judgment in ejectment when the plaintiff is making an oppressive use of it, citing *Jackson v. Styles* (3 *Wend.* 49), or when the plaintiff's title to the premises has terminated, or where the defendant has, subsequent thereto, acquired some interest or equity in the subject-matter which should be protected, or when the judgment was procured by fraud or collusion (see, also, *Armstrong v. Cummings*, 20 *Hun.* 313; *Brown v. Met. Gas. L. Co.*, 38 *How. Pr.* 133).

In *Chadwick v. Spargur* (*supra*) it was said, "that if the justice goes beyond his jurisdiction, either ['] in taking cognizance of the proceeding or while he is acting in it, this court might doubtless restrain; so it might, I think, if it appeared that the tenant had equities which the justice could not protect."

These cases, I think, sufficiently indicate the cases in which this court can, under its equity powers, restrain the execution of the warrant; and I cannot conceive it to be necessary to add anything to the exposition of the law thus made. They indicate the rule which should apply to and would be likely to be decisive of any given case.

The question arises, does the plaintiff make out a case which would authorize the court to interfere with the execution of the warrant which has been ordered to be issued by the justice before whom the proceedings were had?

It was urged on the argument of this motion on the plaintiff's behalf, that the relation of landlord and tenant was created by the writing of May 1, 1883, which forms a part of the papers in the case, and by which the payment of the rent was attempted to be secured. But I do not so understand the transaction. The agreement for the letting of the premises, and for the amount of rent to be paid therefor, and when to be paid, was fixed before that day, and about the middle of

Broadwell v. Holcombe.

April, 1883, plaintiff agreeing to give security for the payment of the rent. The security given on the first day of May was in pursuance of such previous ['] agreement, and was not the original, but a collateral, undertaking and obligation. The rent was to be paid monthly in advance.

I do not find in the writing of May 1, 1883, any waiver on the part of the landlord, either of the payment of the rent monthly in advance or of his right to invoke his remedies under the statute, in case of a failure to pay the rent when due. And a collateral security has this quality, that it does not necessarily suspend legal efforts and remedies to enforce the principal undertaking, according to its terms, until it be fully satisfied; and when that is accomplished the security should be given up. In any event the questions raised before the justice were legal, ['] and involved the determination of the time and terms of the letting of the premises; and as to rent being in arrear, and the effect of the agreement providing for collateral security, such were within the jurisdiction of the justice to decide, and this court has no supervisory power over his judgment, to review it, or supersede its execution, in a suit of the character of the one now under consideration.

If there is any error in the proceedings before the justice or in his decision, it can be corrected only ['] on appeal; and if his decision should be ultimately reversed, the plaintiff's remedy under the Code is by an action for damages. It is thus seen that the plaintiff has a remedy at law, and in such case equity cannot interfere.

The motion for a continuance of the injunction must therefore be denied, and the temporary injunction must be dissolved, with ten dollars costs.

Pratt v. Underwood.

PRATT, RESPONDENT, v. UNDERWOOD, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT; GENERAL TERM, MARCH, 1883.

§§ 620, 713, 715.

Action for dissolution of partnership.—Instance of such action in which receiver was properly appointed.—Instance of injunction order that court had not power to make.—Order restraining defendant from interfering with or disposing of partnership property cannot be made in such action pendente lite unless the plaintiff gives the undertaking required by section 620 of the Code of Civil Procedure.

Where, in an action to dissolve a partnership and procure a settlement of the partnership business, began in January, 1883, it appeared that the partnership had been entered into May 14, 1882, for the purpose of publishing and issuing a paper called *Underwood's Counterfeit Detector*, and was to continue for three years from May 1, 1882, and that during that year the parties became involved in such dissensions and disagreements as rendered the further continuance of the partnership business by them impracticable, and that the defendant had in December, 1882, commenced a suit in equity in supreme court of the District of Columbia to obtain a discovery of the subscriptions received for the said *Detector*, after May 4, 1882, and had on December 30, 1882, amended his bill therein by adding a prayer for the dissolution of the partnership, and the plaintiff had in January, 1883, filed a cross bill in said court for the settlement of the affairs of the partnership, and that a receiver was appointed in those suits to take charge of its assets,—*Held*, that a receiver of the partnership effects and assets could very properly be appointed, ['] and that an order appointing as such receiver the person who had been appointed receiver in the actions in the District of Columbia, and which required from him ample security for the discharge of the duties of his office, was eminently just and proper.[']

Where, in such case, the order appointing the receiver also prohibited the defendant from editing, publishing, and issuing the said *Detector*,

Pratt v. Underwood.

and it appeared that the *Detector* was the individual property of the defendant,—*Hell*, that as the further prosecution of the partnership business had become impracticable, and the *Detector*, could not be published in the course of it, as it had been brought to an end by the disagreement of the parties, the defendant, as the owner of the *Detector*, could not legally be restrained from continuing its publication himself and upon his own account, [6] and that that part of the order containing such prohibition should be unqualifiedly reversed. [6]

In an action to dissolve a partnership and secure a settlement of its affairs, an order restraining the defendant from disposing of the assets of the firm is in fact an injunction, [7] and cannot be granted *pendente lite* unless the undertaking required by section 620 of the Code of Civil Procedure is given. [4] Such order is no less an injunction because it was made a part of an order appointing a receiver than it would have been if it was separate and independent, [8] and the security given by the receiver for the performance of his duties will not take the place of the required undertaking which is designed to protect the defendant against the loss or injury which might be produced to him by preventing his interference with the partnership assets. [5]

Dayton v. Wilkes, 17 How. Pr. 510, followed. [1]

(Decided May 11, 1883.)

Appeal from an order appointing a receiver of the effects and assets of a partnership existing between the plaintiff and defendant, and restraining and enjoining the defendant from disposing of any of the partnership property, and from editing, publishing, issuing, and distributing a paper called *Underwood's Counterfeit Detector*, or any like or rival publications.

The opinion sufficiently states the facts.

Robert N. Wait, for appellant.

The court or judge has no power to grant an injunction order without security until after final decision. . . . The appeal herein involves a jurisdictional question, viz., that the court had no power to grant an injunction order without security; but if it were a discretionary order, there exists a right of appeal to the general term.

Pratt v. Underwood.

The court cannot, because of the comity existing between courts of different states, support an injunction which the law of the state where the application for the injunction order is made does not allow. The statute is express that the party applying for an injunction order must give security before the order is granted. *Code*, § 620. The court here is called upon to decide the case as presented on all the facts, and not to follow the decision between the same parties in a suit in another state.

Birdseye, Cloyd & Bayliss, for respondent.

The order appealed from was rightly made, . . . and should be allowed to stand, in all respects, as entered. It was discretionary, and will not be reviewed on appeal. *Code Civ. Pro.* §§ 713, 714; *Sheldon v. Weeks*, 2 *Barb.* 532; *Fellows v. Heermans*, 13 *Abb. Pr. N. S.* 1; *People v. Schoonmaker*, 50 *N. Y.* 499; *Ludvigh v. Dusseldorf*, 8 *N. Y. Weekly Dig.* 420; *Young v. Campbell*, 75 *N. Y.* 525. It should be sustained by reason of the comity existing between courts of different states of the United States. . . . The restraining part of the order is only part of a general order appointing a receiver, and is not within the provisions of section 620 of the Code of Civil Procedure requiring an undertaking on an application for an injunction order. Defendant's counsel had notice of the settlement of the order, and was present on such settlement, and if he had any objection to raise should have raised it then. . . . Even if security was required upon a restraining order of this kind, defendant's proper course would have been to apply to the justice making the order for a re-settlement, and to have appealed from the order denying such motion. The omission, if any, is one that may be supplied, and is not ground for vacating or modifying the order unless plaintiff refuses to give security, if required, by the

Pratt v. Underwood.

court. N. Y. Attrition Pulverizing Co. v. Van Tuyl, 2 Hun, 373; Palmer v. Foley, 71 N. Y. 106.

DANIELS, J.—The parties were engaged in business as partners under an agreement made on May 4, 1882, for the publication and issuing of *Underwood's Counterfeit Detector*. The partnership, it was agreed, should be continued for the period of three years from May 1, 1882. But during that year the parties became involved in such dissensions and disagreements as rendered the further continuance of the partnership business by them impracticable, and in the month of December, 1882, the defendant in this suit commenced an action in equity against the plaintiff in the supreme court of the District of Columbia to obtain a discovery of the subscriptions received for the *Detector* after May 4, 1882. The bill was amended on December 30, 1882, by adding a prayer for the dissolution of the partnership, and in January, 1883, the defendant in that action filed a cross-bill for the settlement of the affairs of the co-partnership, and a receiver was appointed to take charge of its assets and property.* During the same month of January this action was commenced in this court for dissolution of the partnership and the settlement of the partnership business.

It is very clear from this litigation that the parties disagreed in such a manner as to render the further
['] prosecution of their partnership business a practical impossibility, and for that reason a receiver

* The order appointing such receiver restrained both parties from disposing of any of the assets or effects of the partnership, "and from in any manner obstructing, hindering, or in any way from interfering with the said receiver in the management of said partnership until the further order of the court, and also from publishing, editing, issuing, distributing, and mailing to subscribers of said paper any paper or publication of a similar character pending the settlement of said partnership affairs." The order appointing a receiver in this action contained a clause restraining the defendant in almost the same terms.

could very well be appointed to take charge of the effects and assets of the firm. By the order from which the appeal has been taken the same person was appointed receiver as had been appointed to that office in the actions in the Supreme Court of the District of Columbia, and ample security was required from ['] him for the discharge of the duties of his office. To that extent the order seems to have been eminently just and proper; and, as the case was made to appear, so much of the order as restrained the defendant from disposing of the assets of the firm was also well ['] sustained; but this part of the order was in fact an injunction. It was no less so because it was made a part of the order appointing the receiver than it would have been if a separate and independent order had been entered containing this clause. For that reason, under the Code of Civil Procedure, the ['] plaintiff was bound also to give security to entitle himself to this order (*Code*, § 620). The design of that security was to protect the defendant against the loss or injury which might be produced to him by ['] preventing his interference with the partnership assets; and the bond required to be given on the appointment of the receiver contained no stipulation of that nature. So much of the order as contained the injunction was therefore made without any security whatever.

This was not authorized by the provision of the Code, and on account of that omission so much of the order as contains the injunction should be dissolved, unless within twenty days after notice of this decision the plaintiff, with one or more sufficient sureties, shall enter into and file an undertaking in the form prescribed by the provision of the Code relating to that subject.

It is not probable, as the case is made to appear, that any serious injury can be produced to the defend-

Pratt v. Underwood.

ant by the restraining clause of the order, and for that reason an undertaking in the sum of \$250 will probably be sufficient.

The additional restraint imposed by the order prohibiting the editing, publishing, and issuing of ['] *Underwood's Counterfeit Detector* was not authorized by the circumstances; for the *Detector*, according to the terms of the co-partnership agreement and the affidavits in the case, appears to have been the individual property of the defendant. And as the further prosecution of the partnership business had become impracticable, and it could not be published in the course of it, as it had been brought to an end by the disagreement of the parties, the defendant, as its owner, could not legally be restrained from continuing its publication himself and upon his own account. The fact that the partnership business could no longer be prosecuted necessarily left him in a situation where he was at liberty to carry on business for himself by the publication of this *Detector*.

As it could not be published for and on account of the partnership, his individual title to it permitted him to make the publication on his own account.

A point similar to this was presented in *Dayton v. Wilkes*, 17 *How. Pr.* 510. The case was carefully ['] considered, and the conclusion which has been intimated was there adopted. That seems to be reasonable and proper under the circumstances now made to appear, and the same course may with propriety be here adopted. So much of the order as ['] restrained the defendant in the future publication of the *Detector* should therefore be unqualifiedly reversed, and that part of the order which provided for the appointment of the receiver should be affirmed. And so should that part of the order prohibiting interference with the partnership assets in case the undertaking directed shall be given and filed; and as neither

Ess v. Toplanyi.

party can wholly succeed in the appeal the disposition already indicated should be made of it without costs to either party.

DAVIS, P. J., and BRADY, J., concurred. ,

ESS v. TOPLANYI.

CITY COURT OF NEW YORK, CHAMBERS, NOVEMBER,
1883.

§§ 650, 651.

Examination of person having property of the defendant in an attachment in his possession.—Extent of such examination where it is based on the witness's refusal to give a certificate as to the amount of the property.

Where, on the examination of a person having in his possession property belonging to the defendant in an attachment, based on his refusal to give a certificate as to the amount of the property, the witness claimed title to the property under an assignment made in consideration of a prior indebtedness and of advances made by him to the debtor,—*Held*, that the witness could not be examined as to dealings between him and the debtor; [¹] Also,—*Held*, that the invalidity of his claim must be shown in other proceedings, where the whole issue between the parties can be tried and properly determined; [²] that, while this is so, the witness is bound to show the character of his title to the property in question, although he will not be compelled to establish its validity; [³] that, while he cannot be called upon in such an informal and *ex parte* manner to have his rights determined or be subject to a searching cross-examination as to his rights, the plaintiff is entitled to know what his claim is in specific terms, and the authority under which he holds; [⁴] and that the assignment to the witness should be produced, and the circumstances and conditions under which it was given shown, and a specific statement of his claim upon the property given. [⁵]

Barter v. Missouri, Kansas and Texas Railway Co. (67 Baro. 288) [⁶] and

Ess v. Toplanyi.

Glen Cove Starch Co. v. Gotthold (1 *N. Y. Civ. Pro.* 366), [?] approved and followed.

(*Decided November 6, 1888.*)

Examination of witness as to property in his possession belonging to the defendant in an attachment, upon his refusal to furnish a certificate.

The action was brought to recover the sum of \$329.50 for board and lodging furnished and money expended for the defendant by the plaintiff. An attachment was granted in the action on the ground that the defendant had made an assignment of certain moneys received by him from the United States as pension, amounting to about \$3280, to one William S. Andrews, his attorney, for the alleged purpose of cheating and defrauding his creditors.

A copy of the attachment was served on said Andrews, who was subsequently required to appear and submit to an examination as to the property of the defendant in his possession, pursuant to section 651 of the Code of Civil Procedure. Upon such examination it appeared that he claimed title to the moneys under such assignment, and upon questions being put to him concerning his dealings with the defendant he objected and the matter came before the court on such objection. Further facts are stated in the opinion.

Theodore Von Bremsen, for plaintiff.

William S. Andrews, in person.

HAWES, J.—The plaintiff herein obtained an attachment against the property of defendant, and served the same upon the witness Andrews, now under examination. An order of examination was obtained requiring the witness to appear to be examined, upon the ground that he had refused to make the required

Ees v. Toplanyi.

certificate. Upon the return day of the order, he appeared and stated that he was not unwilling to make a certificate, but that there was some misunderstanding as to the time when it was to be served; that he had since filed such a certificate, but was willing to be examined also, if so desired. The examination, accordingly, proceeded, and the question now presented is as to the extent which such examination should be allowed. For all the purposes of the motion, I think that I may hold that it is based upon a refusal to file a certificate, although I should have held that the witness was relieved from it if he had elected to avail himself of his rights in that regard. Section 651 of the Code of Civil Procedure is based upon section 236 of the Old Code, and that in turn upon the statute of 1848 (2 R. S. 99). Section 13 of article 8, title 1, chapter 5, part 2, of the Revised Statutes is very wide-reaching in the power conferred in such an examination, giving the plaintiff power to examine as to all matters touching the concealment of the debtor's property, and touching all matters relative to the dealings of the debtor with the witness; but this is based upon the assumption that the court has good reason to believe that the party has concealed or embezzled the debtor's estate. In the case at bar the witness claims title to all the money in his possession by reason of a prior indebtedness, and of advances made by him to the debtor. The plaintiff claims the right to examine as ['] to the dealings between the witness and the debtor.

An examination of the authorities inclines me to think that he cannot do so upon this motion, under the facts submitted.

It is claimed by plaintiff that upon his testimony taken herein the witness is entitled to only a portion of the money. This is controverted by the testimony submitted by the witness. In the case of *Baxter v. Missouri, Kansas and Texas Railway Co.* (67 *Barb.*

Ess v. Toplanyi.

['] 283), the court held that the party could state the character in which he held the money in his hands, and the manner it was obtained and the object, in gathering it. But the plaintiff could go no further, and the validity of such trust was the subject of investigation in another mode. In the case of Glen Cove

['] Starch Co. v. Gotthold (1 N. Y. Civ. Pro. 366), Mr. Justice Lawrence, referring to the above case, very aptly says that the object of the examination is not to try the title of the witness, but to ascertain the character and extent of that title. So far as appears upon the face of the papers, the indebtedness of the debtor to the witness is a valid claim, but its invalidity can be shown by the plaintiff; but it must be done

['] in other proceedings where the whole issue between the parties can be tried and properly determined.

While, however, this is true I think that the witness is bound to show the character of his title to

['] the property in question, although he will not be compelled to establish its validity. This distinction may seem a refined one, but I think that the decisions tend to establish it, and it is based on sound reasons. A party cannot be called upon in this

['] informal and *ex parte* manner to have his rights determined, neither can he be subject to a searching cross-examination as to his rights. The law gives him the right of jury, and of a proper power for the determination of the validity of his claim. On the other hand, the plaintiff is entitled to know what his claim is in specific terms, and the authority under which he holds. The distinction is, it seems to me, a very clear one, and is based upon sound reason. It appears that there exists an assignment of the money in question to the witness. The assignment must

['] be produced and the circumstances and condition under which it was given must be shown. I think that the witness should also give a specific statement

Estate of Fricke.

of his claim upon the money (*Rutter v. Boyd*, 3 Abb. N. C. 6). The examination, under this phase of the case, is clearly within the scope of the decision. The examination, under the suggestion shown, will proceed on Monday, the 5th inst., at eleven A. M.

ESTATE OF WILLIAM D. FRICKE, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, OCTOBER,
1883.

§ 2672.

Extent of surrogate's power to direct the application of money in the hands of a temporary administrator.

The authority of a surrogate's court to direct the application of any money in the hands of a temporary administrator is limited to the occasions for which provision is made in section 2672 of the Code of Civil Procedure, viz., "to pay funeral expenses or any expense of the administration of his trust."

Where the proponents of a will, pending a contest concerning its probate, applied for an order directing the temporary administrator of the estate involved to pay such sums as might be deemed proper to enable them to procure the attendance of expert witnesses to testify upon the question of the insanity of the decedent,—*Held*, that the order asked for is one which the court has not power to grant, and the motion must be denied.

(Decided October 29, 1883.)

Petition for an order directing a temporary administrator to pay to petitioners such sums as may be deemed proper to procure the attendance of witnesses on the probate of a will.

The petitioners were the proponents of a will made by the decedent, the probate of which was contested.

Estate of Fricke.

Pending such contest, they made this application for the purpose of obtaining the attendance before the Surrogate, in such proceedings, of expert witnesses to testify upon the question of the insanity of decedent.

M. C. Gross, for the motion.

Frank Keck, opposed. .

ROLLINS, S.—Section 2672 of the Code of Civil Procedure declares the Surrogate “may, by order, authorize” a temporary administrator “to pay funeral expenses, or any expenses of the administration of his trust.” The authority of the court to direct the application of any moneys in the hands of the temporary administrator is limited to the occasions for which provision is made in that section of the statute which is above quoted.

Clearly the petitioner in this proceeding asks for a direction which the court is powerless to give.

Motion denied.

Steffin v. Steffin.

STEFFIN, RESPONDENT, v. STEFFIN ET AL., IM-
PLEADED, ETC., APPELLANTS.

SUPREME COURT, FOURTH DEPARTMENT; GENERAL
TERM, APRIL, 1883.

§§ 102, 1405.

The plaintiff in an execution cannot maintain an action to prevent, or recover for, the taking away and conversion of property levied upon by the sheriff under such execution.—May maintain action to remove obstruction to the orderly enforcement of the execution, and in aid of it.—Effect of stay of plaintiff's proceedings after judgment, execution and levy thereunder and mode of obtaining relief therefrom.—Rights and liabilities of sheriff.

A sheriff who has levied upon personal property under an execution has a right to the possession of the property levied upon, and the right to maintain any needful actions at law to recover the same, or for the conversion of the property after his levy; [1] and the fact that property so levied upon has been taken from the possession of the sheriff, or that the defendant in the execution has conspired with others to take away such property, does not support, in the plaintiff in the execution, a right to maintain an equitable action either to prevent the removal of the property or to recover because the same was secretly or otherwise removed or converted. [1]

If a sheriff does not do his duty after levying upon personal property, under an execution issued to him; if he does not keep the property, and take legal remedies to obtain the same, so that it may be sold to apply on the execution, he is liable to the plaintiff in the execution. [2]

Whether a sheriff would be obliged to, or warranted in turning over property levied upon by him under an execution to a receiver appointed in an action other than that in which the execution was issued, and to which he was not a party; whether, if he did turn it over to such receiver, he would thus avoid his liability to the plaintiff in the execution for its value, *quære*. [3]

Where a sheriff has made a levy under an execution issued to him, a

Steffin v. Steffin.

stay of proceedings granted in the action in which the execution was issued does not lessen his right to hold possession of the property.^[4]

If a stay of plaintiff's proceedings in an action after judgment, execution and levy are prejudicial to him, his appropriate remedy is an application to the court which granted the stay for an order vacating, or modifying the same, so that the injury may be prevented or avoided.^[5] It furnishes no ground for the interference of the court upon the equity side.^[6]

Where a sheriff has lawfully entered upon real property for the purpose of levying upon personal property thereon under an execution, he has a right to remain upon the premises a sufficient length of time to make a levy; and where the defendant in the execution permits him to leave the property upon the premises, he, as against such defendant, may enter with bidders and sell the property;^[7] and where the property so levied upon consisted of crops and farming implements, the surrender of his lease of the premises by the defendant, made after the levy, will not carry with it the property levied upon by the sheriff, the title to which was in the execution debtor at the time of the levy, and a purchaser of the crops will succeed to all the rights of the debtor therein.^[8]

After a levy on personal property by the sheriff, under execution, a debtor cannot transfer any title to it, even to a *bona fide* purchaser, for value and without notice; but before levy, even after delivery of execution to the sheriff, a *bona fide* purchaser may acquire a good title.^[9]

The objection that the plaintiff in an equitable action has a remedy at law does not come too late when it is taken on appeal from an order overruling a demurrer to the complaint.^[10]

Where the defendant in an execution held a lease of a farm by which he agreed to deliver to the lessor one half of all the products of said farm, and that she should have a lien upon all the personal property which was or should thereafter be put upon said farm as security for his doing so,—*Held*, that the lease not having been filed as a chattel mortgage when levies under the execution were made on such personal property, it was not valid as to the plaintiff in the execution.^[11]

Where, in such a case, the plaintiff in the execution brought an action in equity, and alleged in his complaint facts which lead up to the conclusion that as to him the security clause was inoperative and was being used as a fraudulent obstruction to the lien of his execution and the enforcement thereof out of the property covered by the lease,—*Held*, that such allegations support the right of the

Steffin v. Steffin.

plaintiff to invoke the aid of a court of equity to remove the obstruction in aid of the execution, and that in such cases it was not necessary to have an execution returned *nulla bona*, as a precedent condition of the right of a court of equity to take jurisdiction.^[14] *Gillett v. Staples* (16 *Hun*, 588), distinguished.^[11]
(Decided June, 1888.)

Appeal from an order and interlocutory judgment of Monroe county Special Term, overruling a demurrer, by George Steffin, and a joint demurrer of Mary A. and William H. Lockwood, to the amended complaint, upon the ground that the same does not state facts sufficient to constitute a cause of action.

E. A. Nash, for Mary A. and William H. Lockwood, appellants.

George E. Warner, for appellant, George Steffin.

Horace L. Bennett, for respondent.

The facts are fully stated in the opinion.

HARDIN, J.—September 24, 1880, upon a verdict in the county court of Munroe county, the plaintiff recovered a judgment against George Steffin for \$1,000.13, and issued an execution on that day to the sheriff of Munroe county, who at 5:25 P. M. of that day levied upon certain property of George Steffin. On the 7th day of October, 1880, an execution on said judgment was also issued to the sheriff of Livingston county, who made a levy upon certain property described in the complaint, and other property unknown to the plaintiff.

George Steffin held a lease of the Benjamin farm from Mary A. Lockwood, the owner thereof, and in the lease was an agreement to yield and deliver "one half of all the products of said farm to Mary A. Lockwood."

Steffin v. Steffin.

The lease also stipulated, "that the said party of the first part shall have a lien as security for the payment of the debt aforesaid, upon all the goods, wares, chattels, implements, fixtures, tools, and other personal property, which are or may be put on the said demised premises." The complaint avers "that George Steffin works all, or a part, of Mary A. Lockwood's farm in Livingston county, as aforesaid, upon halves." Also, "that the county court granted a stay of plaintiff's proceedings on said judgment for sixty days after judgment, execution, and levy; and that the stay is still in force; and that George Steffin does not intend to take any further proceedings in that action." Also, "that the defendants conspired and confederated together to divest and defeat said levy, and to prevent said sheriff from making any further levy upon the property of said George Steffin, and to prevent the plaintiff from collecting or securing his said judgment; that, in pursuance of such plan, confederation, and conspiracy, said Mary A. Lockwood, or said William H. Lockwood acting as her agent, caused notices to be posted in said town, advertising a public sale, under the lease, of certain described property upon the Benjamin farm; sale to be October 5, 1880. Notice was dated September 28, 1880, and signed by William H. Lockwood, mortgagee's agent."

The complaint also averred "said lease has never been filed in the office of the clerk of the town of Mendon. That, at the time and place of the sale, W. H. Lockwood, claiming to act as the agent of said Mary A. Lockwood, with an auctioneer and attorney, was present, and claimed a right to sell said property under said lease, and in pursuance of said notice; and said Mary A. Lockwood was also present in person." That the sale was postponed to October 15, 1880, and written notice thereof posted, but no sale was had; and plaintiff avers "that it is the intention of said

Steffin v. Steffin.

defendants to make such sale in some secret manner, so that the same may not be forbidden by plaintiffs, and then claim that said property had been purchased by divers persons, insolvent purchasers, and then to have such persons either take said property by force, or commence a large number of actions against the sheriff, or this plaintiff, to recover the same."

Plaintiff avers "that since said levy was made the defendants have attempted to rescue said property from the sheriff and have actually succeeded in getting into said granary and carrying away a quantity of said wheat, and have sold and drawn away in the night and on Sunday all of the barley levied on by said Livingston county sheriff since said execution was put into his hands and a levy made thereon, and they have secreted said new lumber wagon, and they have come upon said Benjamin farm with many men, and have threatened the men in charge of said property for the sheriff with violence," . . . "and have in many other ways tried to intimidate the men in charge of said property for sheriff, and have actually frightened some away, so that it is now very difficult to get men to go there to watch said property, as well as very expensive."

Plaintiff also avers "that defendants now claim that since said levy was made George Steffin has surrendered his lease to Mary A. Lockwood, and that she is now in possession of said farm, and that they have forbid said officers to come upon said farm; but plaintiff is informed, and believes, that said surrender of said lease is all a sham and fraud, and is done to prevent the purchaser of said straw from feeding the same upon said premises, as required by said lease, and to prevent the sheriff from keeping the cattle and horses thereon, and to otherwise complicate matters so as to better cheat and defraud the plaintiffs."

Plaintiff avers "that Steffin does not intend to

Steffin v. Steffin.

appeal said action in the county court, but merely keeps the stay on said plaintiff's proceedings therein so that he cannot sell said property," thinking that the sheriff had no right to harvest said crops, and that the omission of said George Steffin to harvest said crops constitutes such a breach of the conditions of said lease as that said Lockwood may take said property, or gain some other undue advantage thereby."

Plaintiff then avers "that George Steffin refuses to harvest said crops, and that he and said Lockwood refuse to consent that said sheriff may harvest them."

Plaintiff next avers "that since said execution was issued, a large quantity of wheat, to wit, about 1200 bushels, and about 500 bushels of oats, have been fraudulently converted and disposed of by said defendants, one half of which belonged to George Steffin, and upon which said judgment was a lien, besides the barley sold as aforesaid." Plaintiff then avers "that the barley belonging to George Steffin there disposed of by defendants, or some one of them, is worth \$200; that the value of the oats is \$100; that the value of the wheat is \$400; all of which plaintiff would have been able to sell and apply upon the said judgment except for the fraud and misconduct of the defendants."

Plaintiff next avers "that said Lockwood and said Frederick Steffin and Charles Steffin now claim to own a large part of the property levied on, although at the time of the levy the defendants admitted that it all belonged to said George Steffin."

Plaintiff avers "that the defendant George Steffin had no real estate and no personal property except that levied on as aforesaid." That defendants William H. Lockwood, Charles Steffin and Frederick Steffin "are wholly insolvent and irresponsible; . . . that Mary A. Lockwood claims to own said two farms; . . . and that whilst she recognizes said William H. Lockwood

Steffin v. Steffin.

as her agent in most matters connected with said farm, she will attempt to repudiate any act of his in connection with the matters aforesaid whereby she may become liable to plaintiff, and has already threatened to do so; and that unless an injunction be issued restraining said defendant from interfering with said property, and a receiver be appointed to take charge of it, the plaintiff must lose the benefit of his levies and his said judgment, and will be subjected to numerous actions and great costs and expenses."

It is to be observed in the outset of our consideration of the complaint that the sheriffs who have the executions issued in county court are not made parties to this action, and that they are under the direction and control of that court in respect to the property levied upon. By their levies they have the right to the possession of the property levied upon, and the

['] right to maintain any needful actions at law to recover the same, or for any conversion of the property after their levies.

['] If the sheriffs do not do their duty after levy; if they do not keep the property and take legal remedies to obtain the same, so that it may be sold to apply on their executions, they are liable to the plaintiffs. *Ansonia Brass & Copper Co. v. Pratt*, 74 *N. Y.* 400.

['] It may well be doubted whether the sheriffs would be obliged to or warranted in turning over the property levied upon to a receiver appointed in another action; or, if they did turn it over to such receiver, whether they would thus avoid their liability for its value to the plaintiff in the executions. *Ansonia Brass & Copper Co. v. Pratt*, *supra*. The stay of proceedings upon the judgment did not

['] lessen the sheriff's right to hold possession of the property levied upon. *Rhoads v. Woods*, 41 *Barb.* 471. The sheriffs were the parties who had

Steffin v. Steffin.

['] the right to maintain an action for taking away the property from their possession, and the allegations in the complaint do not support any any right in the plaintiff to have and maintain an equitable action, either to prevent the removal of the property from the sheriff's possession or to recover because the same was secretly or otherwise removed and converted. *Ansonia Brass & Copper Co. v. Pratt*, 10 *Hun*, 443; *Baker v. Mathews*, 1 *Denio*, 335; *Skinner v. Stuart*, 39 *Barb.* 206; *Marsh v. White*, 3 *Barb.* 518; *Scott v. Myers*, 10 *N. Y. Weekly Dig.* 531.

['] If the stay of the proceedings was prejudicial to the plaintiff, his appropriate remedy was an application to the county court for an order vacating or modifying the same, so that the injury might be prevented or avoided. It furnishes no ground for the interference of this court upon the equity side. The

sheriff had a right to remain upon the premises a sufficient length of time to make a levy (*Crocker on Sheriffs*, § 437); and when the defendant in the execution permitted him to leave the property upon the premises, the, sheriff, as against such defendant, might enter with bidders and sell the property. *People v. Hopson*, 1 *Denio*, 575-580. And the surrender

['] of the lease made after the levy would not carry with it the property levied upon by the sheriffs the title to which was in the execution debtor at the time of the levy, and a purchaser of the crops would succeed to all the rights of the debtor therein. *Whipple v. Foot*, 2 *Johns.* 418; *Hartwell v. Bissel*, 17 *Johns.* 128.

We see no force in the theory that the defendant, the execution debtor, should be restrained from selling or encumbering the personal property, as, after a levy on it by the sheriffs, the debtor could transfer no title to it, even to a *bona fide* purchaser for value received, without notice. *Butler v. Maynard*, 11 *Wend.* 548. But before levy, even after delivery of execution

Steffin v. Steffin.

to the sheriff, a *bona fide* purchaser may acquire a good title. *Ib.*; *Stewart v. Beale*, 7 *Hun*, 415.* As to the other defendants, the title which they had before levy is valid, and ought not to be interfered with, either by sheriffs, receiver, or the court. The leading facts of this case show that the plaintiff has an adequate remedy at law, which he began to pursue in the usual mode, and no good reason is found, in the exceptional features of the case, for saying that a bill in equity should be sustained, or a receiver appointed, as to property not embraced in the lease or surety clause thereof. *Parker v. Moore*, 3 *Edw. Ch.* 234.

In the case just cited the Vice Chancellor said there seemed to be no obstacle in the way of the party's remedy at law, and that all that he had to do was to rely upon the execution, and therefore a motion for the appointment of a receiver was denied. The ["] objection that the plaintiff has a remedy at law does not come too late, according to well established precedents. *Le Roy v. Platt*, 4 *Paige*, 77; *Truscott v. King*, 6 *N. Y.* 147. The case of *Gillett v. Staples* (16 *Hun*, 588) is not in point, as it was a creditor's bill filed after the return of an execution *nulla bona*, and it was said that the defendant, the judgment debtor, before the bill was filed, claimed all the property belonged to others than himself."

["] But the lease, with the security clause therein, had not been filed as a chattel mortgage when the levies were made, and therefore the same was not valid as to the plaintiff, having a judgment and executions upon which levies had already been made before such filing. *Stewart v. Beale*, 7 *Hun*, 405.* The lease stood as an obstruction to the orderly enforcement ["] of the executions, and, though void as to the

* Affirmed, 68 *N. Y.* 639.

Steffin v. Steffin.

security clause as against the plaintiff's judgment, it was valid between the parties thereto.

Plaintiff has alleged the facts which lead up to ["] the conclusion that as to him the security clause is inoperative, and is being used as a fraudulent obstruction to the lien of his executions and the enforcement thereof out of the property covered by the lease. Such allegations support the right of the plaintiff to invoke the aid of a court of equity to remove the obstruction in aid of the executions; and in such cases it is not necessary to have an execution returned *nulla bona* as a precedent condition of the right of a court of equity to take jurisdiction. *Clarkson v. De Peyster*, 3 *Paige*, 320; *Stowell v. Haslett*, 5 *Lans.* 382; *Stewart v. Beale*, *supra*; *McCaffrey v. Hickey*, 66 *Barb.* 491.

It follows, therefore, that the court had jurisdiction; that the complaint stated facts sufficient to constitute a cause of action as against George Steffin, the judgment debtor, who executed the lease, and as against Mary A. Lockwood, the lessee, who was attempting to use the security clause in the lease to defeat the enforcement of the executions and the liens thereof acquired by the plaintiff. But in that aspect of the case we see no need for the presence, as a party, of William H. Lockwood, the agent and husband of Mary A. Lockwood. It is not averred that he was a party to the lease, or that he had any interest in it. Its removal and cancellation could be made perfect without his presence as a party. It follows, therefore, that as to him the complaint does not state facts sufficient to constitute a cause of action.

Judgment and order affirmed, with costs, as to George Steffin and Mary A. Lockwood; and judgment and order reversed as to William H. Lockwood, with costs; and demurrer sustained, with costs, with

 Plimpton v. Bigelow.

leave to the plaintiff to amend his complaint upon payment of the costs of appeal and costs of the demurrer.

SMITH, P. J., and HAIGHT, J., concurred.

PLIMPTON, APPELLANT, v. BIGELOW,
RESPONDENT.

COURT OF APPEALS, 1883.

§§ 641, 644, 647, 649.

Attachment.—Shares of stock in a foreign corporation cannot be attached.—Only property within the jurisdiction of the court issuing an attachment can be attached.—The residence and domicile of a corporation are alone within the bounds of the sovereignty which created it, and it cannot pass beyond that jurisdiction.—A corporation may sue and be sued in this State, not because it is within the State, but because it must act by agents, and may, through its agents, subject itself to the jurisdiction of a foreign tribunal.—Nature of the right and interest of a stockholder in a corporation by reason of his ownership of shares of its stock.—Levy under attachment upon property without the jurisdiction of the court should be vacated and set aside.

The general principle that attachment proceedings can be effectual only against property within the jurisdiction of the court issuing the attachment is clearly recognized in the provisions of the Code regulating proceedings by attachment, [1, 2] and those provisions are to be construed with reference to that principle.[1] In the case of tangible property capable of manucaption, it must have an actual *situs* within the jurisdiction.[1] To debts, choses in action, rights by contract, the shares of the defendant in a corporation and other intangible property, which the Code makes subject to attachment, [1, 2] the same principle applies, viz., that the *res*, that is, the intan-

Plimpton v. Bigelow.

gible right or interest, to be subject to attachment, must be within the jurisdiction;[¹,²] but it must be a constructive or statutory presence only, founded upon some characteristic fact which determines its locality.[¹]

It is too well settled by the repeated adjudications of the Federal and State courts to admit of further controversy, that a corporation has its domicil and residence alone within the bounds of the sovereignty which created it, and that it is incapable of passing beyond that jurisdiction.[⁴] It is equally true that a foreign corporation is permitted to sue in the courts of this State, and that suits *in personam* may be brought against it by a service of a process upon its officers or agents within the jurisdiction;[⁵] but such suits are not maintained on the theory that the corporation litigant is here in person, or that the corporation entity attends its officers in their migration from one state to another, or that it is itself present wherever its property may be or its business may be transacted.[⁶] The jurisdiction rests upon the ground that, as a corporation must act by agents, it may, through its agents, subject itself to the jurisdiction of a foreign tribunal.[⁴]

The right which a shareholder in a corporation has by reason of his ownership of shares is a right to participate, according to the amount of his stock, in the surplus profits of the corporation, and ultimately, on its dissolution, in the assets remaining after paying its debts.[⁷] It is this right and interest which is made liable to attachment under section 647 of the Code of Civil Procedure.[⁷] The right of the shareholders is enforceable by judicial proceedings in the local courts, and local courts alone can be resorted to to wind up its affairs and distribute its assets.[¹]

The stock of a foreign corporation is not here because it has property here, or is conducting its business in this State.[⁸] It seems impossible to regard the stock of a corporation as being present for the purpose of judicial proceedings except at one of two places, viz., the place of residence of the owner, or the place of residence of the corporation.[⁹] The shares for the purpose of attachment proceedings may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by intendment of law always remains, to wit, in the state or county of its creation.[¹⁰]

The individual members of a corporation are not the owners of its property, or of any part of it.[⁶] The abstract entity, the corporation, is the owner, and the only owner of the property.[⁹]

The fundamental condition of attachment proceedings—that the *res* must be within the jurisdiction of the court, in order to an effectual

Plimpton v. Bigelow.

seizure—is not answered in respect to shares in a foreign corporation by the presence here of its officers, or by the fact that it has property and is transacting its business here; and therefore section 647 of the Code, which provides for the attachment of shares of the stock of a corporation owned by the defendant, must be construed as applying to domestic corporations only.^[11]

Where an attachment has been granted and an effort made to levy thereunder upon stock in a corporation which was not within the jurisdiction of the court, and therefore not subject to attachment, by the service of a notice upon an officer of the corporation, the defendant is entitled to have the levy set aside and vacated, thereby relieving his stock from the cloud and embarrassment created by the proceedings.^[12]

Lafayette Ins. Co. v. French (18 How. U. S. 404), approved; ^[9]
Plimpton v. Bigelow (8 N. Y. Civ. Pro. 182), reversed.^[13]
(Decided November, 1883.)

Appeal from order of the Supreme Court, General Term, First Department, reversing an order of the Special Term vacating an attachment.

The opinion states the facts.

Simon Sterne (*Sterne & Thompson*, attorneys), for appellant.

Section 647 of the Code does not authorize any attachment of a stockholder's interest in a foreign corporation. The rights and shares in a foreign corporation are not within the state, even in the case where the certificate is within the state. *Christmas v. Biddle*, 13 Penn. 223; *Moore v. Gennet*, 2 Tenn. Ch. 375.

. . . These statutes should all be strictly, and not liberally, construed, because they are a departure from the common law, even as to subjecting stock in domestic corporations to levy and sale; as at common law stock in a corporation was not the subject-matter of levy and sale. *Denton v. Livingston*, 9 Johns. 96.

. . . And a shareholder in a corporation has no legal title in its property or profits until a division is made. *Hyatt v. Allen*, 56 N. Y. 553. Although a corporate body may carry on business beyond the territorial

 Plimpton v. Bigelow.

limits of the state which created it, it has no corporate existence beyond those limits. *Day v. Newark India Rubber Co.*, 1 *Blatchf.* (*U. S. Circ. Ct.*) 628; *Bank of Augusta v. Earle*, 13 *Pet.* (38 *U. S.*) 588; *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 *Black* (66 *U. S.*) 286.

Edward D. Bettens (*Bettens & Lilienthal*, attorneys), for respondent.

Where a corporation, created by the laws of one state, comes by its officers within the jurisdiction of another state, and there engages in business, or undertakes to act, it becomes amenable to the laws of the latter state and the process of its courts, upon the same principles and to the same extent that natural persons or companies incorporated by such latter state would be. 1 *Potter on Corp.* p. 371, note 9; *Martine v. International Life Ins. Soc.*, 53 *N. Y.* 348-8; *Morawetz on Corp.* §505; *People v. Central R. R. Co.*, 48 *Barb.* 508; *Attorney-General v. Bay State Co.*, 1 *Gray (Mass.)*, 148; *National Bank v. Huntington*, 128 *Mass.* 444; *Barr v. King*, 96 *Penn. St.* 485. . . . A corporation of another state may exercise its franchises and transact business here, upon such conditions as the laws of this state (New York) may impose. The presumption that a corporation cannot be found out of the state which created it is no more cogent than that an individual is not to be found out of the state of which he is an inhabitant. *Robinson v. National Stock Yard Co.*, 12 *Fed. Rep.* 361; *Mohr v. Insurance Co.*, 12 *Id.* 474; *Mohr v. Lamar Co.*, 12 *Id.* 476-7; *Merchants' Co. v. Grand Trunk Co.*, 13 *Id.* 358. . . . No state need allow the corporations of other states to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation, express or implied, the corporation comes in as it has been created. Every cor-

Plimpton v. Bigelow.

poration necessarily carries its charter wherever it goes, for that is the law of its existence. *Reefe v. Rundle*, 103 *U. S.* (13 *Otto*) 222. This case is followed by the Court of Appeals of Virginia, November, 1882, in *Bock-over v. Life Association*, 12 *Ins. Law J.* 117.

While the citizenship of the corporation would depend upon the law of the place of its creation, its residence might, manifestly, upon the principle above stated, be in any state where it was by comity permitted to exercise its franchise. *Bank of North America v. Chicago R. R.*, 32 *Ill.* 493.

ANDREWS, J.—This action is brought by the plaintiffs, residents of Massachusetts, against the defendant, a resident of Pennsylvania, upon several promissory notes of the defendant made and delivered in Massachusetts, and payable generally. The plaintiff procured an order for the service of the summons upon the defendant by publication, and also a warrant of attachment against his property. The sheriff of the city and county of New York, to whom the warrant was directed, undertook to execute it by levying upon four hundred and thirty-nine shares of the stock of the Hat Sweat Manufacturing Company, a Pennsylvania corporation incorporated under the laws of that state, owned by the defendant, and for which he held and then had, in the state of Pennsylvania, stock certificates issued and delivered to him at the office of the company in Philadelphia, in February, 1882, at which place the stock and transfer books of the company then were and still are kept. The sheriff, for the purpose of making the levy, left with the secretary of the company, in the city of New York, a certified copy of the warrant of attachment, together with the notice prescribed by section 649 of the Code of Civil Procedure. The formal proceedings were taken to complete the levy, and the shares were subjected to the attachment,

Plimpton v. Bigelow.

provided they were liable to attachment under section 647 of the Code. That section declares that the "rights or shares which the defendant has in the stock of an association or corporation, together with the interest and profits thereon, may be levied upon ; and the sheriff's certificate of the sale thereof entitles the purchaser to the same right, and privileges with respect thereto, which the defendant had when they were attached."

The question here is whether this section applies to shares of stock of a foreign corporation. It is to be observed that the section is one of the provisions ['] of a system of proceedings by attachment, and is to be construed in view of the fundamental principle upon which attachment proceedings rest, that the *res* must be actually or constructively within the jurisdiction of the court issuing the attachment, in order to effect any valid or effectual seizure under the process. In the case of tangible property capable of actual manucaption it must have an actual *situs* within the jurisdiction. But credits, choses in action, and other intangible interests are made by statute susceptible of seizure by attachment. The same principle, however, applies in this case as in the other, viz., the *res* ; that is, the intangible right or interest, to be subject to the attachment, must be within the jurisdiction. But it is manifest from the nature of this species of property that it must be a constructive or statutory presence only, founded upon some characteristic fact, which determines its locality. Where the defendant who owns a credit is within the jurisdiction there is no difficulty, through proceedings *in personam*, in reaching and applying it in discharge of his debt to the plaintiff. But where he is out of the jurisdiction, and the debt or duty owing to him, or the right he possesses, exists against some person within the jurisdiction, attachment laws fasten upon that circumstance, and by notice

Plimpton v. Bigelow.

to the debtor or person owing the duty or representing the right, impound the debt, duty, or right, to answer the obligation which the attachment proceeding is instituted to enforce. In the case supposed, the debt, duty, or right, for the purpose of attachment proceedings, is deemed to have its *situs* or locality in the jurisdiction.

The general principle that attachment proceedings can be effectual only against property within the ['] jurisdiction is clearly recognized in the provisions of the Code regulating proceedings by attachment. They authorize the attachment of debts, choses in action, rights by contract and, by section 647, shares of the defendant in a corporation, subject, however, to the limitation that the property attached must be within the jurisdiction. Section 641 prescribes that the warrant shall require the sheriff to attach the property of the defendant within his county, and by section 644 it is made the duty of the sheriff to execute the warrant by levying upon the property of the defendant within the county.

These provisions leave no doubt of the intention of the legislature to confine the process of attachment within its legitimate limits. They recognize the ['] principle found in the Codes of all enlightened nations—that jurisdiction, to be rightfully exercised, must be founded upon the presence of the person or thing in respect to which the jurisdiction is exerted within the territory (*Story's Con. of Laws*, §§ 532, 592 a; *Gibbs v. Queen Ins. Co.*, 63 *N. Y.* 114; *Street v. Smith*, 7 *Watts & S. [Penn.]* 447).

We now come more directly to the inquiry upon which the case now under review depends, viz., whether the shares of a non-resident defendant in the stock of a foreign corporation can be deemed to be within this state by reason of the fact that the president or other officers of the corporation are here engaged in carrying

Plimpton • Bigelow.

on the corporate business. We do not overlook the fact that we are construing a section of the Code the language of which is sufficiently general to include foreign corporations; but they are not expressly named; and, for the purpose of determining whether foreign corporations were intended to be included, it is a relevant inquiry whether, upon general principles, the right which a stockholder in a corporation has by reason of his ownership of shares is a debt or duty of the corporation existing in a foreign jurisdiction, wherever the officers of the corporation may be found engaged in the prosecution of the corporate business. If the corporation by having its officers and by transacting business in a state other than its domicile of origin is deemed to be itself present as an entity in such foreign state, to the same extent and in the same sense as it is present in the state which created it, it may be conceded that its shares might be properly attached in such foreign jurisdiction. But we regard the principle to be too firmly settled by repeated adjudication of the Federal ['] and state courts to admit of further controversy, that a corporation has its domicile and residence alone within the bounds of the sovereignty which created it, and that it is incapable of passing personally beyond that jurisdiction (*Bank of Augusta v. Earle*, 13 *Pet.* [38 *U. S.*] 519; *Lafayette Ins. Co. v. French*, 18 *How.* [59 *U. S.*] 404; *Merrick v. Van Santvoord*, 34 *N. Y.* 208; *Stevens v. Phoenix Ins. Co.*, 41 *Id.* 150).

But it is equally true that a foreign corporation is permitted to sue in the courts of this state, and that suits *in personam* may be brought against it by ['] service of a process on its officers or agents within the jurisdiction (Code, §§ 432, 1780; *Gibbs v. Queen Ins. Co.*, *supra*). But suits by or against foreign corporations are not maintained on the theory that the corporation litigant is here in person, or that the corporation entity attends its officers in their migra-

Plimpton v. Bigelow.

tion from one state to another, or that it is itself present wherever its property may be or its business may be transacted. The jurisdiction, as I understand, rests upon the ground that as a corporation must act by agents, it may, through its agents, subject itself to the jurisdiction of a foreign tribunal. This principle

['] was clearly recognized by CURTIS, J., in *Lafayette*

Ins. Co. v. French (*supra*), which was an action on a judgment obtained in the state of Ohio against an Indiana corporation by service of process on an agent of the corporation in the former state, and the point was taken that no jurisdiction was thereby acquired to render a judgment against the defendant. The court overruled the point, and Judge CURTIS, after stating that the corporation in that case, existing duly by virtue of the law of Indiana, cannot be deemed to pass personally beyond the limits of that state, and that the actual presence in a state of a defendant is not in all cases essential to a judgment against him, said: "The inquiry is not whether the defendant was personally within the state, but whether he, or anyone authorized to act for him in reference to the suit, have notice and appeared; or, if he did not appear, whether he was bound to appear, or suffer judgment by default."

Where a foreign corporation sends its agent into another state, or transacts its business there, availing itself of the protection of the laws of such state, there is no just reason why it should not be deemed to have subjected itself, through its agents, to the jurisdiction of the courts of that state, and be held to respond to an action brought against it therein, upon process served upon its representatives. This seems sufficiently plain. But it does not determine the present question. The proceeding authorized by section 647 of the Code is not an action against a foreign corporation, or to enforce any contract or liability of the corporation, but a proceeding in an action against a defendant owning shares

Plimpton v. Bigelow.

therein, and where the jurisdiction depends upon the shares which are attached being within the state. The

right which a shareholder in a corporation has by ['] reason of his ownership of shares is a right to participate, according to the amount of his stock, in the surplus profits of the corporation, and ultimately, on its dissolution, in the assets remaining after payment of its debts (*Burrall v. Bushwick R. R. Co.*, 75 *N. Y.* 211). It is this right and interest which is made liable to attachment under the section referred to. The right of the shareholders is derived from the corporation, under its charter of the laws of the state which created it. It is enforceable by judicial proceedings in the local courts; and in case of dissolution of the corporation, the local courts alone can be resorted to to wind up its affairs and distribute its assets. It seems impos-

['] sible to regard the stock of a corporation as being present for the purpose of judicial proceedings except at one of two places, viz., the place of residence of the owner, or the place of residence of the corporation.

Section 647 has an appropriate application to shares in domestic corporations. Such corporations are completely subject to the jurisdiction of our courts, and may be compelled to recognize the title to corporate shares derived under proceedings by attachment. In respect to foreign corporations such power does not exist, and it could scarcely be expected that the courts of another state would recognize a title to corporate stock in one of its own corporations founded upon a sale under an attachment issued by our courts against a non-resident, when the only semblance of jurisdiction over the property was the service of notice in the attachment proceedings upon an officer or agent of the corporation here. The foreign corporation is not

here because its agents are here, nor because it has ['] property here; nor is the stock here because the corporation has property or is conducting its busi-

Plimpton v. Bigelow.

ness in this state. The individual members of a corporation are not the owners of the property of the corporation, or of any part of it. The abstract entity, the corporation, is the owner and the only owner of the property. We do not doubt that shares, for the purpose of attachment proceedings, may be deemed to [""] be in the possession of the corporation which issued them, but only at the place where the corporation by intendment of law always remains—to wit: in the state or country of its creation. In all other places it is an alien. It may send its agents abroad, or transact abroad, as any other inhabitant may do, without passing personally into the foreign jurisdiction or changing its legal residence. But such agents are not the corporation, and do not represent the corporation in respect to rights, as between the corporation and its shareholders, incident to the ownership of shares.

It is not necessary in this case to define the limits of the legislative powers in subjecting intangible property to attachment by notice served upon such person or corporation as may be designated by the legislature. Manifestly the *res* cannot be within the jurisdiction as a mere consequence of the legislative declaration, when the actual locality is undeniably elsewhere; but in respect to intangible interests, as we have said, there can be no actual seizure of the things, and it can be bound only by notice to some one who represents the thing. In case of a debt, notice to the debtor residing within the jurisdiction is the ordinary proceeding to attach the debt; and if the debtor is a corporation, and the corporation is a domestic one, there is no difficulty. But in some of the states foreign corporations having an agent or a place of business within the state may be charged under what is called the trustee process or garnishment (Barr v. King, 96 Pa. St. 485; National Bank v. Huntington, 129 Mass. 444). In these proceedings, the trustee or garnishee is joined with the principal

Plimpton v. Bigelow.

defendant as a party to the action, and the debt owing by the trustee or garnishee is ascertained, and the liability of the trustee and garnishee is adjudged in the action. There may be no difficulty upon principle in compelling a corporation which has an agent and officer in another state, and is transacting business there, to respond in garnishment proceedings for the debt, although the creditor, the principal defendant, is a non-resident, and is bound to respond; it is certainly just that the judgment which compels the corporation to pay the debt to the plaintiff should protect it in making such payment against a subsequent claim by its creditor. We do not enter into the question here; but whatever view may be taken as to the right to attach a debt owing by a foreign corporation to a non-resident by service of notice on an agent of the corporation within the jurisdiction, we think, in respect to corporate stock, which is not a debt of the corporation in any proper sense, it would be contrary to principle to hold that it can be reached by such a notice.

We are therefore of opinion that the fundamental condition of attachment proceedings—that the *res* must be within the jurisdiction of the court in order to [“] an effectual seizure—is not answered in respect to shares in a foreign corporation by the presence here of its officers, or by the fact that the corporation has property and is transacting business here, and that section 647 must be construed as applying to domestic corporations only (see *Moore v. Genett*, 2 *Tenn. Ch.* 375; *Christmas v. Biddle*, 13 *Pa.* 223; *Childs v. Digby*, 24 *Id.* 26; *Drake on Attachment*, sec. 244, 471, 478). This is decisive of the present case. The right to attach corporate shares depends upon the statute. The Hat Sweat Manufacturing Company was a foreign, and not a domestic corporation. Section 647 is the only authority for the attachment of shares of a defendant in a corporation; and as that section does not apply to

Angle v. Kaufman.

foreign corporations, it is immaterial to what extent the Hat Sweat Manufacturing Company may have brought its property or business into this State. We are [1] also of opinion that the defendant was entitled to have the levy set aside and vacated, thereby relieving his stock from the cloud and embarrassment created by the proceedings (see *Dunlop v. Patterson Fire Ins. Co.*, 74 *N. Y.* 147; *Blossom v. Estes*, 84 *Id.* 617).

[1] These reasons lead to reversal of the order of the General Term, and an affirmance of the Special Term.

ANGLE v. KAUFMAN.

CITY COURT OF NEW YORK; SPECIAL TERM, OCTOBER, 1883.

§§ 791, 793.

Preferred causes.—Preferences under the general rule of practice are governed by section 793 of the Code.—When the right to preference does not appear in the pleadings it is waived by noticing the cause for trial.

Section 793 of the Code of Civil Procedure,—which provides that where the right to have a cause preferred on the calendar does not appear in the pleadings, the party desiring a preference must procure an order therefor, upon notice to the adverse party, and that a copy of the order must be served with or before the notice of trial,—governs preferences under the rules of practice as well as those under the statutes. Accordingly, *Held*, where a cause was clearly entitled to preference under rule 86, that having been noticed for trial by both parties, the plaintiff had undoubtedly waived his right to a preference.

While the court undoubtedly has power in general to control its calendar, its own rules are always absolute and controlling.

(Decided November 1, 1883.)

Angle v. Kaufman.

Motion by the plaintiff to have the cause advanced on the calendar as a preferred cause.

The motion was made on the ground that property of the defendant was held under an attachment issued in the action, and that therefore, under rule 36 of the general rules of practice, the cause was entitled to a preference. The action was at issue, and had been noticed for trial by both parties.

W. L. Flagg, for the motion.

Abram Kling, opposed.

HAWES, J.—I have no doubt about the power of the court in general terms to control its calendar, but its own rules are always absolute and controlling. The plaintiff herein has obtained an attachment, and he moves, on notice, to advance the cause as one preferred under the rules of the court, and the moving papers clearly show that it is such within the provisions of rule 36.* It appeared, however, that the cause is at issue, and has been noticed for trial by both parties. Section 793 of the Code, provides that where the right to a preference does not appear in the pleadings the party desiring a preference must procure an order therefor, upon notice to the adverse party, and that a copy of the order must be served with or before the notice of trial. This provision governs preferences under rules as well as those under the statute, as appears by subd. 10 of section 791. The cause having been noticed for trial, there can be no doubt that the party has waived his rights, as the statute is imperative in regard to the time of such service.† Motion denied with costs of motion to defendant to abide event.

* General rules of practice.

† Where an order is not obtained or served until after service of notice of trial or of argument, it is unavailable. *Robertson v. Schellhaas*, 62 *How. Pr.* 489; *City N'l. Bank v. National Park Bank*, *Id.* 495.

In re National Trust Co.

IN RE NATIONAL TRUST COMPANY.

THE PEOPLE OF THE STATE OF NEW YORK,
APPELLANTS, *v.* THE NATIONAL TRUST COM-
PANY; BEST RESPONDENT.SUPREME COURT, FIRST DEPARTMENT; GENERAL
TERM, MAY, 1883.

§§ 772, 1347.

When an application to vacate, modify or resettle an order should not be entertained by a justice other than the one who made or directed it.

Where the justice by whom certain orders passing the accounts of the receiver of a corporation, and allowing him commissions for his services as such were made, had jurisdiction to entertain the proceedings before him, and make the allowance for commissions, but the sums allowed by him as commissions were erroneous,—*Held*, that a motion, made before another justice, to vacate and set aside or resettle the orders was properly denied; [*] that an application should have been made to the justice who made the order to resettle or vacate them, or an appeal taken for the purpose of reviewing the propriety of the orders made. [']

When the court has power to hear and determine an application made to it, if the order made by it is erroneously made, the remedy provided for its correction is that of an appeal to the general term;[*] but while that is the general course of proceeding for reviewing orders affecting substantial rights, it is not to be regarded as exclusive; for the party entitled to complain of the order may still move to vacate or obtain its reconsideration.[*]

With the exception of orders made by a justice of the court without notice and those known as provisional remedies, no authority has been expressly or by clear implication given by the Code of Civil Procedure to one justice presiding in court to vacate or reconsider an order made by another [', *], and the omission to provide such authority is a circumstance indicating it to have been the intention of the legislature that it should not be exercised.[*]

In its theory, the policy of the Code has been to prevent one judge

In re National Trust Co.

from reconsidering and reviewing the orders which may have been made upon motions heard and decided in a court held by another.^[10] This policy has been ordinarily observed and carried into effect by the determinations of the courts themselves, ^[11, 12] and the rule has been, where the order has not been obtained by collusion, or there is not an absence of jurisdiction in the tribunal directing it, in either of which cases it may be disregarded, to require the application of its reconsideration, when that is not to be made by direct appeal from it, to be made in a court held by the justice originally directing the order; ^[10] the only exceptions to this rule being to provide for cases where the justice giving the direction may himself have died or ceased to be a member of the court, ^[11] and where orders were taken by default. ^[11, 12]

Kamp v. Kamp (59 N. Y. 212), ^[3, 14, 15] Attorney-General v. North American Life Ins. Co. (89 N. Y. 24) ; ^[4] Fisher v. Hepburn (48 N. Y. 41) ^[13] approved.

(Decided October 26, 1883.)

Appeal from order denying motion to vacate and set aside or resettle orders, allowing commissions to the respondent, for his services as receiver.

The facts are fully stated in the opinion.

John C. Keeler, Deputy Attorney-General for appellant.

Francis H. Bangs, for respondent.

BRADY, J.—The National Trust Company of the City of New York was a moneyed corporation, organized under chapter 460 of the laws of 1867. On December 14, 1877, an order was made under the provisions of the Revised Statutes* relating to the subject, upon the petition of certain stockholders of the corporation, enjoining it from transacting any further business, and appointing William J. Best, receiver, for the purpose

* 2 R. S. 464, repealed by Laws of 1880, chap. 245.

In re National Trust Co.

of winding up its affairs. The receiver qualified at once and entered upon his trust, and converted into cash the assets, which consisted chiefly of marketable securities. Within a period of about six months after thus qualifying, these securities had been reduced to cash, and the depositing creditors paid their accounts in full. The corporation had not been dissolved, however, under these proceedings, and, consequently, in March, 1879, the Attorney-General began an action against the corporation to accomplish that result. In April following, judgment was rendered to that effect, and Best was appointed receiver and directed to transfer to himself, as such, the property which he held as receiver in the former proceeding. This he did.

In August, 1878, an order was made in the first proceeding passing the accounts of the receiver from the time of his appointment until June 29, 1878; and it appeared that during that period he had collected, from all sources, \$1,734,642.44, and had disbursed \$1,548,400.98. Upon the coming in of the report he was allowed, as a commission, three per cent. on the sum first named, or \$52,039.27; and an allowance of \$10,000 was also made to his counsel for services. This order was made at Special Term, and is dated August 7, 1878, and is predicated on the report of the referee who was appointed to take proof of all the facts and circumstances stated in the report of the receiver and to examine and pass upon his accounts and to report thereon to this court. On August 7, 1879, a further order was made in the first proceeding, at the Special Term, in which it was recited that the receiver, having given notice to all persons in anywise interested in the National Trust Company of the City of New York, as required by law, of his intention to present and render to this court, at a Special Term thereof, to be held in the County Court House in the City of New York, on June 9, 1879, at ten o'clock in

In re National Trust Co.

the forenoon of that day, a full and accurate account, under oath, of all his proceedings as receiver; and having rendered to the court, pursuant to the statute in such case made and provided, and of such notice, a full and accurate account, under oath, of all his proceedings, and the same having been filed with the clerk of the county on June 12, 1879, an order was thereupon on that day made and entered, pursuant to the provisions of the statute,* referring the account so filed to John S. Lawrence and William A. Boyd, of the city of New York, counsellors at law, who were by the order appointed referees to examine the account and to hear and examine the proofs, vouchers and documents offered for and against it, and to report thereon to this court, and to take proof of the claims presented to the receiver for costs and counsel fees mentioned in the schedule of the account, and to report to this court as to whether the same were proper and reasonable charges against the funds in the hands of the receiver; and that the said John S. Lawrence and William A. Boyd having made their report to the court, dated July 30, 1879, and which was filed with the clerk of the county, and by which it appeared, amongst other things, that the referees had examined the account of receiver so filed, and the proofs, vouchers and documents offered for and against the same, and that the receiver, as such, had in his hands the sum of \$186,-241.46. The receiver was by this order allowed two per cent. upon the sum of \$1,734,642.44, and five per cent. upon the sum of \$41,478.69, which had been received in addition to the sum heretofore stated, and which commissions aggregated in all the sum of \$89,506.65.

It appears further that in July, 1882, an accounting of the affairs of the receivership was begun by the present attorney-general. On the accounting the

* Code Civ. Pro. § 827.

In re National Trust Co.

receiver asked to be credited with \$36,766.73, paid to himself for commissions under the order of August 7, 1879. The attorney-general, believing that the receiver was entitled for receiving and disbursing the sum received by him to no greater amounts than those allowed by law to executors and administrators,* and that such commission was the only sum with which the receiver could ask to be credited, made a motion at the Special Term on the first Monday of August, 1882, to resettle the orders of August 7, 1879, so that the fees adjudged to the receiver should not be more than those allowed by law to executors and administrators. It appears that this motion was never decided, and in December, 1882, the attorney-general withdrew it, having ascertained in the mean time that by an order made August 7, 1875, the sum of \$52,039.27 had been allowed to the receiver for commissions. It also appears that the accounting set in motion by the attorney-general had not been closed, and that the referee had not made his report at that time, whereupon a motion was immediately made by the attorney-general for leave to intervene in a stockholders' proceeding, and to set aside and vacate or resettle the orders of August 7, 1878, and August 7, 1879, and for an order fixing the receiver's fees at the same amount as those allowed by law to executors and administrators. The motion was returnable on the first Tuesday of January, 1883, and was not heard until the 23d of that month. Before the motion was heard the referee had made his report, but it had not been confirmed. The motion was denied for the reason that the justice presiding could not review, as he stated, the action of another justice of this court. Upon this last order the appeal is taken to this court by the attorney-general.

* 2 R. S. 93, as amended by Laws of 1863, chap. 362, and Laws of 1880, chap. 245 (3 R. S. Banks' 7 Ed. 2303); Code of Civil Procedure, §§ 2736-2739.

In re National Trust Co.

As the object was to reduce the amount of commissions which had been allowed, the application was one to resettle a judgment; and it was not made until nearly three years had elapsed from the time of its entry. No fraud or irregularity in obtaining the judgment was alleged.

There can be no doubt of the jurisdiction of the learned justice who presided when the orders were made to entertain the proceeding before him, and ['] to make the allowance for commissions; and assuming the sum allowed to be erroneous, as it may be, for the purposes of this appeal, the application should have been made to him to resettle or vacate the order, or an appeal taken for the purpose of reviewing the propriety of the order made. The learned justice at the special term, therefore, very properly determined that an application to vacate or resettle ['] the order or judgment in reference to the commissions should have been made to the learned justice presiding at the time the orders or judgments were made, if that course were the one which the attorney-general thought best under the circumstances, to adopt.

To entertain applications of this character would lead to inextricable confusion, and would in effect be asking one judge presiding at the Special Term to review the decisions of another, a practice which for a time prevailed to some extent, it may be, in the history of the jurisprudence of the state, but which was attended with serious, if not disastrous, consequences.

It is not necessary to consider whether the attorney-general has any remedy by way of appeal from the order confirming the report of the referee on the last accounting, nor is it necessary to determine whether he has any interest in the proceeding. It must be assumed that the learned justice who presided when the orders and judgments were made of which the

In re National Trust Co.

complaint is predicated, would, on his attention being called to the propositions, make such changes as are demanded by the application of the proper rules of law. And as there seems to have been some error in the amount of the commissions awarded, the better disposition of this matter is to remit it to the Special Term, to be brought on before the learned justice presiding when the orders of August 7, 1878, and August 7, 1879, were directed, for him to make such disposition of the application as, under the circumstances, he shall deem best. The proceedings herein have been set out in detail, so that the necessity of observing and enforcing the rule which prohibits one justice from reversing the order of one of his brethren made in the same tribunal, may be made apparent. The application of the attorney-general before any judge to accomplish the object designed is not warranted upon the decision in the case of *Kamp v. Kamp* (59 *N. Y.* 212), in which the court said: "The application in the case before us is not to reverse the judgment and decision of the court making the orders, or to reconsider the merits of the controversy, but to arrest the proceedings for enforcing a void judgment."

The complaint made in that case was that the order which was the subject of consideration was made without any jurisdiction, and the court sustained the objection. Nor is the application warranted by anything decided in the case of the *Attorney-General v. North American Life Ins. Co.* (89 *N. Y.* 94).

For these reasons the order suggested should be made.

DANIELS, J. (Concurring).—It may be assumed, in the decision of this appeal, that the orders which it was the object of the motion to reconsider were erroneously or inadvertently made; for the allowances made by them to the receiver exceeded the rate prescribed by the

In re National Trust Co.

statute for his commissions. But the orders by which the commissions were allowed were not directed by the justice who presided in the court at the time when the motion resulting in the present order was made. These orders were made at another term of the court, held by another justice, and upon what was then deemed to be a full consideration of the merits of the respective applications.

The court as it was then constituted had jurisdiction to hear and decide the applications; and if the ['] orders were erroneously made, the remedy provided for their correction has been that of an appeal to the General Term, by section 1347 of the Code of Civil Procedure.

But while that is the general course of proceeding prescribed for reviewing orders affecting substantial rights, it is not to be regarded as exclusive; for, in ['] addition to the appeal so provided for, the party entitled to complain of the order may still move to vacate or obtain its reconsideration (*People v. Bergen*, 53 *N. Y.* 405, 410).

But an application of that nature, made before a court presided over by another justice than the one directing the orders, is practically an appeal from one co-ordinate court to another, and that has not been provided for in the system of practice now prevailing in and governing the courts of this State. The only class of cases in which, by the Code, one justice of ['] the court is authorized to vacate or modify the orders made by another, is that provided in section 772 of the Code of Civil Procedure and those relating to provisional remedies. Under that section an order, not being a provisional remedy, but made by a justice of the court without notice, may be vacated by the court, although the justice presiding may be another and different person from the one making the order.

With this exception, and those included as orders

In re National Trust Co.

['] known as provisional remedies, no authority has been expressly or by any clear implication given to one justice presiding in court to vacate or reconsider the orders made by another, and the omission to provide such authority is a circumstance indicating it to have been the intention of the legislature that it should not be exercised. And pursuant to that general policy, the power which previously existed of allowing one justice at Special Term to review trials had before another at the circuit, has been so far qualified that a motion for a new trial must now be heard before the justice presiding at the trial, if he is living and his term of office has not expired, unless he specially directs it to be heard before another judge of the same court (Code of Civ. Pro. sec. 1002).

In its theory, the policy of the Code has been to prevent one judge from reconsidering and reviewing the orders which may have been made upon motions ["] heard and decided in a court held by another; and that policy has been ordinarily observed and carried into effect by the determinations of the courts themselves, before the enactment even of the present Code; and the rule has been very generally adopted and observed, where the order complained of has not been obtained by collusion, or there is not an absence of jurisdiction in the tribunal directing it, in either of which cases it may be disregarded, to require the application for its reconsideration, when that is not to be made by a direct appeal from it, to be made in a court held by the same justice originally directing the order; and the only exceptions made to this rule ["] has been to provide for cases where the justice giving the direction may himself have died, or ceased to be a member of the court, and orders taken by default. In those two events, as the observance of the rule would be impracticable for the purpose of securing what may be just and right, the application

In re National Trust Co.

for a reconsideration of the order may then be made before a court held by another judge. This rule ["'] has been very uniformly adhered to to avoid the unseemly conflict which would otherwise necessarily arise between courts possessing co-ordinate authority, and a departure from its observance has only been sanctioned in the exceptional cases which have already been referred to (*Wilson v. Barney*, 5 *Hun*, 257; *Dinkelspeil v. Levy*, 12 *Id.* 130). Upon this subject it has been justly said that "it would be a very unwise administration of justice, and lead to much vexatious litigation, if a judge holding one Special Term could, upon mere motion, set aside the decision ["'] and judgment of another, upon allegations that the latter had erred as to any of the questions submitted for his determination" (*Fisher v. Hepburn*, 48 *N. Y.* 41, 53). This is without doubt a concise and accurate statement of the rule prevailing in the courts upon this subject, and the application which has now been brought up by appeal was clearly within the ["'] principle of this determination. It was further sanctioned in *Kamp v. Kamp* (59 *N. Y.* 212), where it was said, in the course of the opinion, that the case just referred to "gives the true reason why it is not fit that one judge should sit in review of the decisions and judgments of another judge of the same court; and that reason rests not so much in a want of power to correct what has been mistakenly done as the confusions and vexatious litigation that would be likely to arise from so unwise a course in the administration of justice" (*Id.* 217).

It will be seen that these observations are very just and discreet when the effect of a different practice ["'] is considered. For, if one judge, at a term of court held by him, may reconsider the orders or judgments directed by a preceding judge at another court, his own orders or judgments would be liable to re-examination

In re National Trust Co.

by still another judge ; and the investigation could not often be limited to the intervention of a third tribunal ; for it might with the same propriety be continued, from time to time, as long as any other differently constituted tribunal could be found that would be willing to take up and examine the case.

The principle or practice which would allow that course of proceeding would necessarily bring the courts, as well as their authority into disrepute, and deservedly deprive them of the confidence and respect of the public. Where the preceding order may have resulted from a default, without any actual decision of the court directing it, the principle, of course, would not be applicable (*Thompson v. Erie Railway Co.*, 9 *Abb. N. S.* 233).

But the application which was made in this case [1st] was not dependent upon such an order ; neither was either of the contingencies or qualifications already considered applicable to the case ; for the justice under whose authority the orders were made is still presiding in the same court, and no obstacle whatever stands in the way of an application to him to reconsider the orders because of this erroneous excess of authority included within their direction. And no doubt at all can be entertained, when the subject shall be brought to his attention, that the proper correction in the allowance of the receiver's commissions will at once be made. But if any error or mistake should by any possibility then intervene, the remedy has been clearly prescribed by the provisions of the Code, and that is by way of an appeal from the order.

The order in this case should be affirmed, but without costs, and with liberty to the attorney-general to renew his application at a court held by the justice under whose authority the orders to be considered were made.

Attorney-General v. Continental Life Ins. Co.

IN RE ATTORNEY-GENERAL v. THE CONTI-
NENTAL LIFE INSURANCE COMPANY.

SUPREME COURT, FIRST DEPARTMENT; SPECIAL TERM,
NOVEMBER, 1883.

§ 885.

Depositions to be used on motion.—Court cannot grant order for taking, on the application of any one not a party to the action.

An order for the examination of a person as a witness, under section 885 of the Code of Civil Procedure, for the purpose of procuring his deposition for use on a motion, cannot be granted on the application of a person not a party to the action in which the motion is to be made. The person applying for the order must be a party to the action, and the person to be examined under the order must not be. [1]

Neither the stockholders of an insurance corporation nor the holders of policies therein, nor creditors thereof, are parties to an action because the corporation is. [2, 3]

Where, in an action brought by the attorney-general to dissolve an insurance corporation, a policy holder, who was not a party to the action, moved to set aside, for the alleged fraud of one F., an order directing the receiver of the defendant to compromise and discontinue two actions brought by him against said F., and procured an order to take the deposition of said F., to be used on such motion,—*Held*, that the order to take said F.'s deposition was improperly granted, and should be vacated and set aside. [4]

(Decided, November 6, 1883.)

Motion to vacate and set aside an order for the examination of one Luther W. Frost, not a party to the action, to obtain his deposition, to be used on a motion in the action.

The facts are sufficiently stated in the opinion.

C. E. Rushmore, for motion.

Horatio F. Averill, opposed.

Attorney-General v. Continental Life Ins. Co.

POTTER, J.—This is a motion to vacate an order for the examination of Luther W. Frost as a witness, and to obtain his deposition, to be used on a motion under section 885, Code of Civil Procedure.

The grounds of the motion are that the person procuring such order, and in whose behalf the deposition is to be used, is not a party to the action in which the order is granted or, if he is, then, by the same reasoning, the person to be examined is a party to the action. Said section provides, that, "where a party intends to make or oppose a motion in a court of record . . . and it is necessary for him to have the affidavit or deposition of a person not a party to use upon the motion . . . the court or judge authorized to make an order in the cause may, in its or his discretion, make an order appointing a referee to take the deposition of that person." The residue of the section consists of the essentials of the affidavit to obtain such order, or of the practice under it.

The object of the motion, as appears from the petition upon which the order to take the deposition was obtained, is to set aside an order made in the above entitled action directing the receiver of the defendant therein to compromise and discontinue two actions brought by him as receiver against said Frost, in this court, to recover of him certain moneys alleged to belong to the defendant therein, and to set aside certain conveyances of premises alleged to have been purchased by said Frost with the moneys of the defendant, and the incumbrances upon said premises. The application for this order to compromise and discontinue was made, and the order granting permission to do so was entitled in and entered in this, the above entitled action. It does not appear from any of the papers before me upon this motion that either said application for the order to compromise and discontinue, or that the order granting leave to do so, was either entitled or entered

Attorney-General v. Continental Life Ins. Co.

in the action brought by the receiver against said Frost.

The petitioner shows that he was the holder of a policy of insurance in his own right issued by the defendant, and that his object is to set aside the compromise for the fraud of said Frost. Assuming the facts to be as stated in his petition, and that the deposition of said Frost, if obtained, would establish those facts, it would be manifest justice to the public generally and to the holders of policies in the defendant's company that the order to compromise and the compromise under it should be set aside. But that is not the question upon this motion, at least in the first instance.

The first question here is, whether the means which have been taken for that end are regular or legal. I think it is plain, too plain to admit of discussion, that the word party, as used in section 885, Code of Civil Procedure, means a party to the action, and means the same when used to designate the person on whose behalf the examination is to be had as when used to designate the person to be examined. The order is to be granted by a judge or court competent to make an order in the cause. The person applying for the order to examine must be a party to that cause, and the person to be examined under the order must not be. If the person to be examined is a party to the cause, his deposition can be obtained under other provisions of the Code; and if the person desiring the deposition is not a party to the cause, either by the requirements of the Code or by leave of the court, he is not presumed to have any standing in the court or any rights to be affected by the action. The name of the petitioner nowhere appears in the action, and he was not a necessary or proper party to the action. The action was instituted by the Attorney-General to dis-

Attorney-General v. Continental Life Ins. Co.

solve the corporation named the Continental Life Insurance Company.

I think it quite, if not entirely, fundamental that a stockholder in a corporation is not a party to an action because the corporation is a party. Hence the necessity and frequent occasion of stockholders to apply to the court in which an action is pending between a corporation of which they are stockholders, and other parties, for leave to intervene and become parties to the action. If stockholders in a corporation are not parties by reason of the corporation being a party, then, clearly, holders of policies in and creditors of the corporation which is a party to an action are not parties to an action because the corporation is. Stockholders, policy-holders, and creditors, as a general rule, are represented by the corporation, and, after its dissolution, by its receiver (*Greaves v. Gouge*, 69 *N. Y.* 154; *Brewster v. Hatch*, 10 *Abb. N. C.* 400).

I see, by the application and the order granting leave to compromise, that there were several policy-holders who had intervened, and were represented by counsel respectively on that application. But the petitioner had not intervened, and was not therefore in that sense a party to this action in any way. The motion to vacate the order must therefore be granted, with \$10 costs of motion.

Estate of McKiernan.

ESTATE OF JANE McKIERNAN, DECEASED.

SURROGATE'S COURT, KINGS COUNTY, OCTOBER, 1883.

§§ 2717, 2718.

Administrator disputing claim should file written answer on application for order decreeing its payment.—When he fails to do so, surrogate should order it to be paid.

Where, on petition for a decree compelling an administratrix to pay a claim against the estate of her intestate, she verbally, in open court, disputed the claim and rejected it, but did not file a written answer, *Held*, that a written answer was expressly required in such a case by section 2718 of the Code of Civil Procedure; and that none being filed, and the petitioners alleging assets, the surrogate should grant a decree for the payment of the claim.

(Decided October 28, 1883.)

Petition for an order compelling an administratrix to pay a claim against the estate of her intestate.

The petitioners asked for a decree compelling the payment of a claim against the estate of James McKiernan. The administratrix verbally, in open court, disputed the claim, and rejected it *in toto*. The petitioners contend that a decree in their favor should be entered because of a failure on the part of the administratrix to file a written answer.

James J. Rogers, for the petitioners.

Robert E. Connelly, for the administratrix.

Sections 2717 and 2718 do not warrant the entry of a decree because of a failure to file a written answer. Section 2718 reads that the surrogate must dismiss the petition if a written answer is filed. Written pleadings are not absolutely necessary except, where the surrogate orders that a written answer be filed, a

Estate of McKiernan.

pleading may be oral. *Code*, § 2533. In this case no such requirement was made.

The surrogate has no jurisdiction to try a disputed claim. *Stillwell v. Carpenter*, 2 *Abb. N. C.* 238; *Disosway v. Bank of Washington*, 24 *Barb.* 60; *Wilcox v. Smith*, 26 *Barb.* 316; *Bank of Poughkeepsie v. Hasbronck*, 6 *N. Y.* 216; *Magee v. Vedder*, 6 *Barb.* 352; *Wilson v. Baptist Ed. Society*, 10 *Id.* 308; *Curtis v. Stillwell*, 32 *Id.* 354; *Andrews v. Wellege*, 17 *How. Pr.* 263; *Tucker v. Tucker*, 4 *Abb. Ct. App.* 428.

The provisions of the statute for a reference of disputed claims show that the legislature did not intend to place the trial of them under the control of the surrogate, for in such case the statute requires the agreement to refer to be filed in a law court, and the proceedings therein to proceed to judgment in that court before the surrogate can act in directing its payment. *Andrews v. Wellege*, *supra*; 3 *R. S.* (6th Ed.) 96 and 97, § 47.

If a claim is disputed, and no agreement is made to refer, it must be sued in a court of competent jurisdiction. 3 *R. S.* (6 Ed.) 97.

BERGEN, Surrogate.—It is conceded that a surrogate's court has no jurisdiction to try a disputed claim. On the return day of the citation the administratrix asked for an adjournment, and on the adjourned day failed to file a written answer, as expressly provided by the *Code*, § 2718. In this case, the petitioners alleging assets, and no written answer being filed, as required by said section, I am compelled to grant a decree for the payment of their claim.

Cunningham v. Eisman.

CUNNINGHAM v. EISEMAN.

N. Y. COURT OF COMMON PLEAS; SPECIAL TERM,
NOVEMBER, 1883.

§ 3017.

District Court in the City of New York.—Judgment debtor in judgment recovered therein cannot file transcript thereof with county clerk.

—Transcript issued to party in whose favor judgment was rendered is the only one to be so filed.

A judgment debtor has no right to file a transcript of a judgment recovered against him in a district court in the city of New York with the county clerk, so as to make the judgment a judgment of the New York Court of Common Pleas, in order to give that court jurisdiction to entertain an application he wishes to make to have such judgment set off against another in his favor. The Code provides that the clerk of a district court in the city of New York shall issue a transcript of a judgment to the party in whose favor the judgment was rendered; the transcript so issued, and none other, is the only one to be filed with the county clerk.

(Decided, November 1, 1883.)

Motion to set aside a docket of the judgment made herein by the county clerk on the filing of a transcript thereof by defendant.

The defendant, judgment having been recovered against him herein in the District Court of the city of New York, for the Seventh Judicial District, procured a transcript thereof from the clerk of that court, and filed it with the clerk of New York county, who thereupon docketed the judgment. This he did to make the judgment a judgment of the New York Court of Common Pleas, so that it might, on motion, be set off against a judgment in his favor against the plaintiff.

Samuel J. Goldsmith (John J. Adams, attorney),
for the motion.

David M. Neuberger, opposed.

Malcolm v. Hamill.

J. F. DALY, J.—The judgment debtor has no right to file a transcript of the judgment of the District Court with the county clerk, so as to make the judgment against himself a judgment of the Court of Common Pleas, in order to give the latter jurisdiction to entertain an application he wishes to make to have such judgment set off against another in his favor. The Code, section 3017, provides that the clerk is to issue the transcript to the party in whose favor the judgment was rendered ; that transcript, so issued, is the one to be filed with the county clerk, and no other.

Motion granted ; no costs.

MALCOLM, RESPONDENT, v. HAMILL, APPELLANT.

NEW YORK SUPERIOR COURT, SPECIAL TERM,
AUGUST, 1883.

§ 3251, subd. 5.

Argument in Court of Appeals for which costs are allowed may be either oral or printed.

The word "argument" in subdivision 5 of section 3251 of the Code of Civil Procedure, which provides for the award of costs before and for argument in the Court of Appeals, does not mean oral argument alone, but includes the submission of the reasoning on which counsel relies in a printed form.

(Decided August 8, 1883.)

Motion for a retaxation of respondent's costs.

The clerk of the taxation of costs on appeal to the Court of Appeals herein, allowed \$60 for argument, to which item the appellant objected, on the ground that

Malcolm v. Hamill.

there had been no argument in the court of appeals, the case having been submitted, by consent, without oral argument.

John H. Cole, for the plaintiff.

Stern & Meyers, opposed.

O'GORMAN, J.—The motion papers do not state that printed points were delivered to the court; but from my recollection of the argument of counsel on this motion I assume that such was the case. The question, therefore, is whether the word "argument," as used in section 3251, subd. 5, of the Code, must be understood to mean oral argument alone. The language of some of the rules of the Court of Appeals now in force, give some color to that view.

Rule 21. "When a case is called on the calendar, it must be either argued or submitted. If the appellant appears, he may either argue or submit the case."

The rules of the court of appeals formerly in force, however, refer to printed arguments:

Rule 14. "Cases not exchanged may be submitted on printed arguments," &c. 1 *Bliss' N. Y. Code* [1877], p. 845.

I see no reason to believe that the difference in phraseology in the more recently adopted rules is other than accidental. Counsel have not been able to furnish me with any authorities bearing on the question, and it must be decided according to the reason of the thing and the general understanding and practice in the profession. The intention of the Code, section 3251, is, no doubt, to provide for the compensation of the attorney for services rendered in the progress of the action, and for the labor devoted by him therein. The careful preparation of the printed points for submission to an appellate court involves anxious consideration and the laborious research which forms the basis of every argu-

Malcolm v. Hamill.

ment. On these printed points counsel often mainly relies as the means of keeping fresh in the memory of the court the reasoning on which he hopes to succeed. If, by the consent of counsel on both sides, the case is submitted on these printed points alone, it is with the intention that they may stand in place of oral argument, as being sufficient without it. If the court consent to receive the case and examine it with the aid of these printed points alone, and decide it, it can scarcely be said that it has decided without argument.

The growth of any practice in the profession which would deprive the court of the great benefit of lucid presentation of the case by *viva voce* argument of counsel, would be, I think, injurious both to the bench and the bar; and such practice should not be encouraged.

On the other hand, I cannot say that the submission of a case on printed points alone may not be often a convenient and effective mode of argument, and entitled to as much compensation as if the argument had been spoken and heard, instead of being printed and read.

In my opinion the word "argument," in the section of the Code referred to, comprises within its meaning a submission of the reasoning on which counsel relies in a printed form as well as by spoken address.

The motion to retax must therefore be denied, with \$10 costs.

Lewis v. Stevens.

LEWIS, RESPONDENT, v. STEVENS, APPELLANT.

COURT OF APPEALS, MAY, 1883.

§§ 580, 581.

*When bail has once been duly allowed, the allowance cannot be vacated.—
The court has no power to renew the sheriff's liability as bail
after he has once been regularly discharged from liability.*

Where the defendant in an action was arrested under an order of arrest granted therein, and gave bail, which was excepted to by plaintiff, and notice of their justification given, and the bail was allowed upon plaintiff's default in appearing at the time and place set for the justification, and the bail piece was approved and filed, *Held*, that a motion, by plaintiff, to open such default was properly denied; [4] that the sheriff occupied the position of a surety, and his rights are *strictissimi juris*; being once discharged from his liability, it cannot be revived against his objection. [2]

Where the allowance of bail by a justice was made upon regular notice, and all the proceedings relating thereto were regularly taken in conformity with the Code,—*Held*, that the contingency had occurred upon which the statute declares the sheriff discharged from liability, and the court has not any power to renew his liability: [1] that having been legally discharged from his liability, the sheriff cannot be reinstated as a surety except by express statutory authority, and that none such exists. [2]

Lewis v. Stevens (48 N. Y. Super. 559) reversed. [4]
(Decided June 15, 1883.)

Appeal from order of General Term of New York Superior Court reversing an order denying plaintiff's motion that his default in failing to attend at justification of bail given by defendant on his arrest in the action be opened.

Reported below 48 N. Y. Super. 559.

The defendant was arrested by the sheriff of the city and county of New York, under an order of arrest granted in the action, and gave bail. The

Lewis v. Stevens.

plaintiff served notice that he did not accept the bail given by the defendant, who thereupon gave notice of its justification. The plaintiff did not attend at time and place at which notice was given that the bail would justify, and the bail was therefore allowed upon plaintiff's default, and the bail-piece duly approved and filed. The plaintiff thereafter moved to vacate the allowance of the bail and open his said default, on the ground that on the day the bail was to justify he was absent from the city, being unexpectedly detained therefrom, and his clerks negligently failed to attend to the matter. This motion was denied at Special Term; but the General Term, on appeal, reversed the order of the Special Term. From the order thereupon entered by the General Term this appeal was taken.

Malcolm Graham, for the sheriff, appellant.

A. J. Dittenhafer, for the defendant, appellant.

Henry D. Hotchkiss, for the respondent.

RUGER, Ch. J.—This is an appeal from an order of the General Term reversing an order of the Special Term denying a motion to open a default taken upon a hearing for the justification of bail upon an arrest in the action.

The defendant and sheriff each had notice of the motion; each appeared in opposition thereto, and each appeals from the decision of the General Term.

It is provided by section 580 of the Code of Civil Procedure that for the purpose of justification each of the bail must attend before the judge at the time and place mentioned in the notice, and be examined on oath touching his sufficiency. It is further provided that the judge may adjourn the examination from day to day, in his discretion, till it is completed; but such

Lewis v. Stevens.

adjournment is required to be to the next judicial day, unless, by consent, another day is agreed upon.

Section 581 provides: "If the judge finds the bail sufficient, he must annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk.* The sheriff is thereupon exonerated from liability."

The allowance of bail by the judge in this case was made upon regular notice, and all of the proceedings relating thereto were regularly taken in conformity with the Code.

The contingency had occurred upon which the statute declares the sheriff discharged from liability. We do not think that any power exists in the court to renew his liability. *Ballard v. Ballard*, 18 N. Y. 491; *Butler's Bail*, 1 Chit. 83; *Petersdorff on Bail*, 318; *Trumbull v. Healy*, 21 Wend. 670; *Cornell v. Reynolds*, 1 Cow. 241.

The question involved is one of power, and the Court have no right to speculate as to the effect of the order.

The sheriff has once been legally discharged from his liability, and he cannot be reinstated as a surety ['] except by express statutory authority. We believe that none such exists.

When the court have power to relieve a party from the consequences of a default, it is a question of discretion in the courts below as to whether they will do so or not. The circumstances existing in this case would very well justify the action of the court were this a proper case for the exercise of such power. The sheriff occupies the position of a surety, and his ['] rights are *strictissimi juris*; being once discharged

* Until this is done the justification is not complete. *O'Neil v. Durkee*, 2 Abb. Pr. 383, S. C., 12 How. Pr. 94; *McKenzie v. Smith*, 48 N. Y. 148.

Steele v. Macdonald.

from his liability it cannot be revived against his objection.

We think the order of the General Term ['] should be reversed, and that of the Special Term affirmed.

All concur.

STEELE v. MACDONALD.

CITY COURT OF NEW YORK, SPECIAL TERM,
NOVEMBER, 1883.

§§ 2863, subd. 4; 3228, subd. 3.

Costs.—Plaintiff not entitled to, in an action in a court of record wherein he recovers less than \$50, on the ground that the action involved a matter of account and the total of the accounts exceeded \$400, when the accounts, exclusive of payments, admitted in the pleadings to have been made did not exceed \$400.

Where the plaintiff set out in his complaint a demand for labor and materials valued at \$109, on which \$89 had been paid, and another similar demand for \$90.25 on which \$2 had been paid, and asked judgment for \$108.25, and interest from June 1, 1882, and the defendant set up counter-claims aggregating \$192.82, with interest from September 1, 1882, arising out of a claim for \$715 for money loaned, less \$694 which had been repaid, and another claim of \$172.60 for commissions, and the jury rendered a verdict in favor of plaintiff for \$38.05. *Held*, that the defendant was entitled to costs of the action; that the accounts of both parties did not exceed \$400, within the meaning of subdivision 4 of section 2863 of the Code of Civil Procedure, which provides that a justice of the peace has not jurisdiction of a civil action "where, in a matter of account, the sum total of the accounts of both parties . . . exceeds \$400;" that the payments are in no sense to be considered debts, demands, or accounts, within the meaning of the statute.

To oust a justice of the peace of jurisdiction of a civil action in a

Steele v. Macdonald.

matter of account on the ground that the accounts of both parties exceed \$400, the items of account must have arisen in a course of mutual dealings which themselves constitute an affirmative claim in the defendant's favor, and which have not been specifically appropriated as payments in reduction of plaintiff's claim.
(Decided November 20, 1883.)

Motion for a new taxation of costs.

The facts are stated in the opinion.

T. P. Fitzsimmons, for the motion.

T. G. Evans, opposed.

NEHRBAS, J.—Plaintiff sued on two demands; one for labor and materials, valued at \$109, on which \$89 was paid on account, leaving a balance due of \$20; and the other for \$90.25, on which \$2 was paid on account, leaving due \$88.25, claiming in the aggregate \$108.25, with interest from June 1st, 1882. The defendant set up a counter-claim for money loaned for \$715, on which \$694 had been repaid, leaving \$20.24 unpaid, besides \$172.60 for commissions due defendant, aggregation \$192.84, with interest from September 1, 1882. Upon the trial the jury found a verdict in favor of plaintiff for \$38.05. The clerk taxed costs for the defendant. Plaintiff asks for a direction to tax his bill of costs, and claims that the defendant is not entitled to costs. On this motion the pleadings only have been submitted, with the admitted result arrived at by the jury. The Code, section 3228, subd. 3, provides, in effect, that the plaintiff is entitled to costs, of course, upon the rendering of a final judgment in his favor in an action specified in subd. 4th of section 2863; that is, in cases where a justice of the peace has no jurisdiction. The section last referred to provides that a justice of the peace has no jurisdiction in a matter of accounts where the sum

Steele v. Macdonald.

total of the accounts of both parties, proved to the satisfaction of the justice, exceeds \$400. In other words, if a plaintiff had brought suit in a justice's court, and the sum total of the accounts of both parties had exceeded \$400, necessitating a discontinuance before the justice (*Ex parte Mills*, 10 *Wend.* 557), he could sue in a court of record, and, notwithstanding a verdict in his favor of less than \$50, recover costs. *Boston Mills v. Eull*, 6 *Abb. N. S.* 319; *S. C.*, 37 *How.* 299. The question therefore arises, does the case at bar fall within this provision? The plaintiff claims \$108.25. The defendant asks a set-off of \$20.25, a balance on money loaned, and \$172 commissions. These sums do not aggregate \$400. It is claimed that because defendant set out the amount of the loans to plaintiff \$715, and the payments on account \$694.76, that therefore the case is within the rule. But it has been held in such a case that a justice of the peace must render judgment for the balance found due (*Abernathy v. Abernathy*, 2 *Cow.* 413; *Ward v. Ingraham*, 1 *E. D. Smith*, 538), for the simple reason that payments are in no sense to be considered debts, demands, or accounts, within the meaning of the statute. *Ex parte Mills, supra.* To oust the justice of jurisdiction, the items of account must have arisen in a course of mutual dealing, which themselves constitute an affirmative claim in defendant's favor, and which have not been specifically appropriated as payments in reduction of plaintiff's claim. *Ward v. Ingraham, supra.* Tested by the rules as thus laid down, I am of opinion that the taxation of defendant's costs by the clerk was right, and plaintiff's motion to tax his costs must be denied:

Beecher v. Schieffelin.

BEECHER, AS MANAGER, ETC., v. SCHIEFFELIN, ET AL.

SUPREME COURT, FIRST DEPARTMENT; SPECIAL TERM,
OCTOBER, 1883.

§§ 1781, 1782.

Action to set aside alienation of the property of a corporation by its officers and trustees may be maintained by one employed on a salary to manage its affairs.—A trustee, not personally connected with the transfer, is not a necessary party defendant in such an action.—Instance of a complaint in such an action which was held sufficient.

Where one who, by a contract with a corporation, was to have the "management of the affairs of" the corporation for one year for a salary, before the end of the year brought an action to set aside an alleged unlawful alienation of the property of the corporation, made by its trustees and officers,—*Held*, that he was authorized to maintain such action by sections 1781 and 1782 of the Code of Civil Procedure, which provide that such an action may be brought by a creditor of the corporation or by a trustee, director, manager, or other officer of the corporation having a general superintendency of its affairs.

In an action to set aside an unlawful alienation of the property of a corporation made by its officers and trustees, a trustee who was not in any way personally connected with the transfer is not a necessary party defendant.

Where, in an action against certain trustees and officers of a corporation, individually, and in their official capacity, to set aside an alienation of property of the corporation made by them, the complaint set out the incorporation of the company; the election of the defendant B. S. as president and a trustee of the corporation; of the defendant V. D. and one M. B. as trustees, and of the defendant L. C. S. as secretary and treasurer; the number of shares of stock of the corporation; the names of the holders thereof, and the number of shares held by each; that the corporation, which was made a party defendant, had in December, 1882, entered into an agreement with the plaintiff, whereby it employed plaintiff as manager of its affairs from January 1, 1883 to January 1, 1884; the

Beecher v. Schieffelin.

nature of the business conducted by the corporation—principally that of publishing a weekly newspaper; that a notice of a meeting of stockholders for the purpose of increasing the capital stock of the corporation was published July 9, 16, and 23, 1883; that the meeting was adjourned from time to time, and on an adjourned day it was resolved not to increase the capital stock, and that the defendants, as such officers of said company, in spite of plaintiff's protest, passed a resolution whereby they attempted to assign and transfer all the assets and property of the corporation to the defendant B. S. in satisfaction of a pretended indebtedness to him; that of such last adjournment no notice was published, and M. B., a trustee and stockholder, did not have notice thereof; that such attempted alienation and assignment was a violation of the duties of the defendants, and a breach of the trust reposed in them, and was in pursuance of a scheme to transfer the property of the company to said B. S. to enable him to appropriate it to his own use, and to render valueless the stock of the company to effect a dissolution thereof without due process of law; to oust plaintiff from his office of manager of the said company, and for the purpose of cheating and defrauding its creditors; that the said B. S. has taken possession of the property and assets of the corporation, and removed a part thereof from the state; that he has not paid any of the indebtedness of the company, and has failed for two weeks to issue the regular weekly edition of the paper theretofore published by the company, and that unless restrained by the court, the defendant will render the said corporation insolvent, and forfeit its rights, privileges, and franchises,—*Held*, on demurrer to the complaint, that the plaintiff, as manager, was authorized to bring the action; that there was but one cause of action set up in the complaint, and therefore no misjoinder of causes of action; that said M. B. was not a necessary party defendant, being in no way personally connected with the wrongs complained of, and that the complaint set up a cause of action.

(Decided November, 1883.)

Demurrer to complaint.

The complaint in this action was as follows :

NEW YORK SUPREME COURT,
City and County of New York.

Herbert W. Beecher, as manager of the Metropolitan
Publishing Company v. Bradhurst Schieffelin, indi-

Beecher v. Schieffelin.

vidually, and as president and one of the trustees of the Metropolitan Publishing Company; Lucy C. Schieffelin, otherwise known as Lucy C. Hewitt, individually, and as secretary of the Metropolitan Publishing Company; Victor Dessart, individually, and as one of the trustees of the Metropolitan Publishing Company; and the said Metropolitan Publishing Company.

"The plaintiff, Herbert W. Beecher, complaining as manager of the Metropolitan Publishing Company, alleges as follows:

"I. That said defendant, The Metropolitan Publishing Company, was, at the times hereinafter mentioned, and now is, a domestic corporation, organized December 9, 1880, pursuant to and in accordance with the provisions of an act of the legislature of the state of New York, entitled 'An act to authorize the formation of Corporations for Manufacturing, Mining and Mechanical or Chemical purposes,' passed February 17, 1848, and of the several acts extending and amending said act.

"That a copy of the certificate of the incorporation of said company is hereto annexed, marked schedule 'A,' and made a part of this complaint.

"II. That on or about the 16th day of December, 1882, said defendant, Bradhurst Schieffelin, was elected to fill the office of president and one of the trustees of said company, and said defendant, Victor Dessart, and one M. Buchanan, were also elected to fill the office of trustees of said company for the period of one year from the said date; and that on or about the 20th day of June, 1883, said defendant, Lucy C. Schieffelin, otherwise known as Lucy C. Hewitt, was elected to fill the office of secretary and treasurer of said company until the next annual election, on or about December 15, 1883.

"That on or about the 29th day of December, 1882, said plaintiff and said defendant, The Metropolitan Publishing Company, entered into an agreement in

Beecher v. Schieffelin.

writing, marked schedule 'B,' and made a part of this complaint, wherein and whereby said plaintiff was engaged as the manager of the affairs of said company from the 1st day of January, 1883, until the 1st day of January, 1884.

"III. That the principal business of said company consisted, until the 27th day of August, 1883, of the publication, at the city of New York, of a weekly newspaper, known as 'House and Home,' which newspaper had a large number of subscribers, aggregating at least 14,000, and was until said date in receipt of a large amount of money from advertisements, aggregating for the preceding year at least \$6,000.

"IV. Upon information and belief, said plaintiff further alleges that the capital stock of said company was divided among the following persons, viz.: said defendant, Bradhurst Schieffelin 75 shares; said plaintiff, 15 shares; said defendant, Lucy C. Schieffelin, otherwise Hewit, 8 shares; and said M. Buchanan and Victor Dessart, each, one share.

"V. Upon information and belief, said plaintiff further alleges that on or about the 9th, 16th and 23d days of July, 1883, a notice of which the following is a copy was published in said newspaper:

"Metropolitan Publishing Company. Notice. A meeting of the stockholders of the Metropolitan Publishing Company will be held on the 28th day of July, 1883, at the office, 252 Broadway, New York, at 12 o'clock, noon, for the purpose of increasing the capital stock to one hundred thousand dollars.

B. SCHIEFFELIN,

M. BUCHANAN, Trustees.

"That on said 28th day of July, 1883, the requisite number of stockholders failed to attend said meeting, whereupon the same was adjourned until the 10th day of August, 1883; that on said adjourned day said

Beecher v. Schieffelin.

meeting was further adjourned until the 11th day of August, 1883; that on said adjourned day said meeting was further adjourned until the 14th day of August, 1883, but no notice of said adjournment was published; that on said adjourned day a resolution was passed not to increase the capital stock of said company, as specified in said notice; and that thereupon, without any previous notice to said plaintiff, and in spite of his protest, said defendants, as such officers of said company, without notice being given to said Buchanan of said meeting, and in his absence, passed a resolution whereby they attempted to assign and transfer all the property and assets pertaining to said newspaper, the 'House and Home,' together with the income and receipts of the same due, and to become due to said defendant, Bradhurst Schieffelin, in satisfaction of a pretended indebtedness to said Bradhurst Schieffelin from said company.

"VI. Said plaintiff further alleges that said attempted alienation and assignment was a violation of the duties of said defendants, and a breach of the trust reposed in them, and was without warrant or authority in law, and said plaintiff alleges that the same was made in pursuance of a scheme to turn over to said Bradhurst Schieffelin the property and assets of said company, and enable him to possess himself thereof and appropriate the same to his own use, and in this manner to render valueless the stock of said company and to effectuate a dissolution thereof without due process of law and to oust said plaintiff from his said office of manager of said company and to deprive him of the same and to violate the aforesaid agreement between said plaintiff and said company and to enable said defendants, or some of them, to organize another company and publish said newspaper under another name, for the purpose of cheating and defrauding the creditors of said company.

Beecher v. Schieffelin.

"VII. Said plaintiff further alleges that on or about the 14th day of August, 1883, said Bradhurst Schieffelin, in pursuance of the aforesaid scheme, fraudulently and unlawfully took possession of the property pertaining to said newspaper, the 'House and Home,' and unlawfully diverted and appropriated the same to his own use, and also took possession of and appropriated to his own use the receipts and income of said company from advertisers and subscribers, which have amounted, as deponent is informed and believes, to at least fifty dollars (\$50) per diem, since said 14th day of August, 1883, until the commencement of this action, and said Bradhurst Schieffelin has also removed the books and accounts of said defendant, The Metropolitan Publishing Company, from the office of said company, in the city of New York to the state of New Jersey.

"VIII. Said plaintiff further alleges upon information and belief, that said Bradhurst Schieffelin has not paid any part of the indebtedness of said company, since said 4th day of August, 1883, to the creditors of said company, and which indebtedness, said plaintiff alleges, amounts to a large sum of money, but not as large as the value of the assets of said company, so as aforesaid unlawfully appropriated by him, and has not issued the edition of said newspaper, the 'House and Home' for the weeks ending August 27 and September 3, 1883, and that unless restrained by the judgment of this court said individual defendants will render said company insolvent and forfeit its rights, privileges and franchises.

"Wherefore said plaintiff asks judgment against said defendants, and each of them, as follows:

"I. That said individual defendants may be compelled to account for their official conduct in the management and disposition of the funds and property committed to their charge.

"II. That said individual defendants may be com-

Beecher v. Schieffelin.

pelled to pay to the said defendant, The Metropolitan Publishing Company, which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost or wasted by a violation of their duties.

"III. That the aforesaid alienation and assignment of the property of said defendant, the Metropolitan Publishing Company, to said Bradhurst Schieffelin may be set aside.

"IV. That said defendants may be enjoined and restrained from collecting or receiving any debt or demand, or from paying out, or in any way transferring or delivering, to any person any money, property or effects of said defendant, The Metropolitan Publishing Company, during the pendency of this action.

"V. That a receiver of the property of said defendants, The Metropolitan Publishing Company, be appointed by this court, with the usual powers of receivers in like cases.

"VI. For such other or further relief in the premises as to the court shall seem just, together with the costs of this action."

This complaint was signed by the plaintiff's attorney, and duly verified. Annexed to it was a copy of the certificate of incorporation of The Metropolitan Publishing Company, marked "Schedule A," and a copy of the agreement of said company with the plaintiff referred to in the complaint, marked "Schedule B." By this agreement the plaintiff agrees "to continue the management of the affairs of The Metropolitan Publishing Company," and the company agreed to pay him "for the services to be performed by him a compensation or salary of \$35 per week . . . in the manner following, viz., the sum of \$20 per week in cash, payable at the end of each week, and the balance in the capital stock of said company, to be taken by said

Beecher v. Schieffelin.

Beecher at the par value thereof, and transferred to him by said company, as same shall be earned by him as aforesaid, and he shall demand the same."

To this complaint the defendants demurred on "the grounds that it appears upon the face thereof: First. That the plaintiff has not the legal capacity to sue. Second. That there is a defect of parties defendant in the omission of M. Buchanan, a trustee of the said Metropolitan Publishing Company. Third. That the complaint does not state facts sufficient to constitute a cause of action. Fourth. That the plaintiff has improperly united an alleged personal cause of action with one appertaining, as alleged in the complaint, to the said Metropolitan Publishing Company."

E. R. Meade, for the demurrer.

Russell Benedict, opposed.

The first objection cannot be sustained unless it appears on the face of the complaint that plaintiff has not capacity to sue. If the complaint merely fails to show the facts which confer the capacity to sue, the objection must be taken by answer, not by demurrer. *Barclay v. Quicksilver Mining Co.*, 6 *Lans.* 25; citing *Phoenix Bank v. Donnell*, 40 *N. Y.* 412; see, also *Irving National Bank v. Corbett*, 10 *Abb. N. C.* 85 . . . The second objection is taken under subd. 6 of § 438 of the Code of Civil Procedure. Buchanan was not a necessary party defendant, because § 1781 of the Code, under which the present action is brought, distinctly provides that "an action may be maintained against one or more trustees, directors, managers or other officers of a corporation, to procure a judgment," &c., &c. Even without this provision he would not be a necessary party to this action; for even though others, alleged to have been engaged in the scheme are not joined, there is no defect of parties defendant, because these parties

Beecher v. Schiffelin.

were joint tort feorsors with defendant, and severally as well as jointly liable to plaintiff, and it is therefore, at his option to sue any one or all. *Pierson, Rec'r v. McCurdy*, 61 *How. Pr.* 134; *Smith v. Rathburn*, 22 *How. Pr.* 130. The presence of Buchanan is not essential to the protection of the defendants herein; the controversy can be completely determined without it; and the rule that if the court can determine the controversy without prejudice to the rights of others then a demurrer for a non-joinder of parties is not well taken, applies to this case. *Hillman v. Hillman*, 14 *How. Pr.* 456; *Newbould v. Warren*, 14 *Abb. Pr.* 80. And to sustain the demurrer on this ground it must appear on the face of the complaint that the party not joined is jointly liable with the one sued. *Stockwell v. Wager*, 30 *How. Pr.* 271; *Wooster v. Chamberlain*, 28 *Barb.* 602. It is only the parties to an alleged fraudulent scheme who can properly be joined as defendants, and there is no pretense in the complaint that Buchanan was guilty of any illegal acts; unless, therefore, this does appear affirmatively, he would be an improper party. *Alexander v. Katte*, 10 *Abb. N. C.* 449. . . . The plaintiff sues "as manager;" a reference to the adjudications upon this term may be appropriate. *Wharton's Law Lexicon*, 7th Ed. (1883), defines "manager" as a "superintendent, a conductor or director." A "managing agent" of a corporation, within the meaning of the statute in reference to service of process on the corporation, is "one who is engaged in the management of the corporation in distinction from the management of a particular branch or department thereof. *Brewster v. Mich. Centr. R. R.*, 5 *How. Pr.* 183. Managing agent as used in the said statute has been defined to mean "one who is invested with general powers involving the exercise of judgment and discretion, as opposed to an ordinary agent who acts in an inferior capacity and under the direction and

Beecher v. Schieffelin.

control of superior authority both in regard to the extent of his work and the manner of executing it." *Reddington v. Mariposa L. and M. Co.*, 19 *Hun*, 405. It is, however, not a question of law which can be determined upon demurrer; the objection if valid, should have been taken by answer, raising an issue to be tried by a jury. It was said in *Swaizy v. Union Man'g Co.* (42 *Conn.* 556), the term "general business manager" of a corporation was not one to which the law fixed any definite measure of authority, or of the incidents of which the court would take judicial notice, but that the question should have been submitted to the jury as one of fact upon all the evidence."

VAN VORST, J.—I cannot find upon consideration, that either of the grounds of the demurrer are well taken.

The plaintiff, as manager, is authorized to maintain the action. Code, §§ 1781, 1782.

There is really but one cause of action set up in the complaint, and there can be no misjoinder.

Buchanan is not a necessary party defendant. There is nothing in the complaint which connects him personally with the wrong complained of.

The complaint sets up a cause of action. It seeks to get rid of an alienation of property in substance alleged to be fraudulent and beyond the power of the trustees to make. The trustees had no power to do what was done under the allegations of the complaint which the demurrer admits.

There should be judgment for the plaintiff on the demurrer, with liberty to defendant to answer on payment of costs.

Claflin v. Smith.

CLAFLIN ET AL. v. SMITH ET AL.

SUPREME COURT, FIRST DEPARTMENT; GENERAL
TERM, DECEMBER, 1883.

§ 531.

Bill of particulars.—Instance of an action to set aside an assignment for the benefit of creditors as fraudulent, in which a bill of particulars of the grounds on which plaintiff claims the assignment was made to hinder, delay or defraud the creditors of the assignor should be required.

Where, in an action brought to set aside a general assignment for the benefit of creditors, the complaint alleged in general terms that the assignment was made and delivered with intent to hinder, delay and defraud the creditors of the assignor and certain judgment creditors of the assignor, who had been allowed to intervene as defendants—and were interested in sustaining the assignment, moved for a bill of particulars of the grounds on which the plaintiff will claim upon the trial that the assignment in question was made with intent to hinder, delay or defraud the creditors of the assignor, and it appeared that such defendants were greatly interested in the proper defense of the action; that the indebtedness to them, which was very large, was for merchandise sold by them to the assignor; that the assignee is thought to be disaffected to the assignment; that such defendant had been informed and believed that the plaintiffs gave out that the assignor, shortly prior to his insolvency, transferred his estate or some part thereof so as not to have it passed by the deed of assignment, and that they thus intend to prove the fraudulent intent alleged, but that said defendants have no other or further knowledge of such assertions than that communicated by rumor, and that they do not know what witnesses will be necessary or what facts will be probative under the vague and general allegations of the complaint,—*Held*, that such defendants are entitled to know precisely on what grounds said assignment is claimed to be fraudulent, and their motion for a bill of particulars should be granted.

(Decided December 17, 1883.)

Motion for a bill of particulars.

Claffin v. Smith.

The opinion states the facts.

LAWRENCE, J.—The defendants who make this motion are judgment creditors of Clinton H. Smith, and this action is brought by the plaintiff to set aside a general assignment made by him to the defendant, John G. Smith, for the benefit of creditors. It appears that executions have been issued on the judgments recovered by the moving defendants against Clinton H. Smith, and that said executions have been returned wholly unsatisfied. By an order granted by Mr. Justice PORTER, the moving defendants were allowed to intervene and be made parties defendant in this action, and they now ask that as the assignment in question is alleged in the complaint, in general terms, to have been made, executed, and delivered, with intent to hinder, delay, and defraud the creditors of said Clinton H. Smith, the plaintiffs may be ordered to deliver to them a statement in writing of the times and places at which the plaintiffs intend to prove any acts or things which serve to show that the assignment named in the complaint was done with fraudulent intent, as charged in the complaint, and particularly to what person, and at what times and places, the plaintiffs will claim or offer to prove that the assignor, Clinton H. Smith, made secret or other assignments of his estate. In other words, they ask for the particulars of the ground upon which the plaintiff will claim, upon the trial, that the assignment in question was made with intent to hinder, delay, or defraud the creditors of the assignor.

In the case of *Dwight v. Germania Life Ins. Co.* (84 *N. Y.* 493) the court of appeals held that the power of the supreme court to order bills of particulars extends to all descriptions of actions, and that it may be exercised as well in behalf of the plaintiff as of the defendant.*

* See Note on Bill of Particulars, 2 *N. Y. Civ. Pro.* 241. See also *Shaffer v. Holm*, 3 *Id.* 81.

Claffin v. Smith.

See, also, *Tilton v. Beecher* (59 N. Y. 156). In this case there is nothing in the complaint which apprises the defendants of the grounds on which the plaintiffs will claim that the assignment was executed with the intent to hinder, defraud, and delay the creditors of the assignor. The defendants show that they, as well as the plaintiffs, are creditors of the assignor; that they are greatly interested in the proper defense of the action, and that the indebtedness to them, which is very large, was for merchandise sold by them to the assignor; that the assignee is thought by the creditors to be disaffected to the said assignment; that they are informed, and believe, that the plaintiffs give out that the assignor, shortly prior to his insolvency, transferred his estate, or some part thereof, so as not to have it passed by the deed of assignment; and that they thus intend to prove the fraudulent intent alleged; but that the defendants, impleaded, have no other or further knowledge of such assertion than that communicated by rumor, *etc.*, *etc.* They also allege that they do not know what witnesses will be necessary, or what facts will be probative, under the vague and general allegations of the complaint, and that unless they are furnished with a bill of particulars of the times and places at which the assignor is said to have transferred his estate, with a view to substract it from the assignor, they may be entrapped into a trial without due legal and complete notice of the matters and things affecting their rights under the deed of assignment referred to in the complaint. My examination of the complaint leads me to the conclusion that the motion should be granted. The moving defendants, as has been before observed, are judgment creditors of Clinton H. Smith, the assignor, and the assignment is alleged to be a preferential assignment. It is not before me, but I infer, from what was said on the argument, that this controversy has in some measure

Gusstaf v. American Steamship Co.

arisen from these preferences. The moving defendants are interested as much in sustaining the assignment as the plaintiffs are in attacking it; and they are entitled, I think, to know precisely upon what ground it is claimed to be fraudulent. See, particularly, the remarks of FOLGER, C. J., in *Dwight v. Germania Life Ins. Co.*, before cited (84 *N. Y.* at p. 505); also, *McGreight v. Stevens*, 1 *H. & E.* 454; *Pitts v. Chambers*, 1 *F. & F.* 684; *West v. West*, 4 *S. & T.* 22; *Jones v. Bervicke*, *L. R. 5 C. P.* 32; *Kinder v. Macy*, 7 *Cal.* 206; *Meeker v. Harris*, 19 *Id.* 289.

Let an order be entered in conformity with these views.

GUSSTAF, APPELLANT, v. AMERICAN STEAMSHIP
COMPANY, RESPONDENT.

SUPREME COURT, SECOND DEPARTMENT; GENERAL
TERM, SEPTEMBER, 1883.

§ 886.

Examination of party before trial.—Where party resides in the state he cannot be examined in any county other than that in which he resides, or where he has an office for the transaction of business.

When a party to be examined before trial resides within the state, he cannot be required to attend in any county other than that in which he resides, or where he has an office for the regular transaction of business in person. There is no exception in favor of the county designated as the place of trial.

(Decided December 1883.)

Appeal by plaintiff from an order of the Kings County Special Term, denying a motion to vacate and set aside an order for his examination before trial.

Gustaf v. American Steamship Co.

An order for the examination of the plaintiff before trial was granted on defendant's application, upon an affidavit which recited that the plaintiff's "place of residence is at No. 15 St. Mark's place, in the city of New York." It did not appear whether or where the plaintiff had a place of business.

The order required the plaintiff to appear for examination "in the court-house, in the city of Brooklyn." On its return day the plaintiff made the motion which resulted in the order appealed from.

The place designated as the place of trial was Kings county.

J. Edward Swanstrom, for appellant.

The plaintiff being a resident of the city and county of New York, could not be required to journey into another county for the purpose of being examined. *Code of Civ. Pro.* § 886. This section is peremptory, and will be enforced. *Marsh v. Woolsey*, 14 *Hun*, 1 To the same effect, *Shelton v. Smith*, 1 *Law Bull.* 35.

E. S. Hubbe, for respondent.

BARNARD, P. J.—By section 886, Code of Civil Procedure, when a person to be examined before trial resides in the state, he should not be required to attend in any county other than that in which he resides, or where he has an office for the regular transaction of business in person. The plaintiff resides in the city and county of New York, and has no office in Kings county. The order requires him to appear in Kings county to be examined.

The fact that the place of trial of the action is designated to be Kings county does not enlarge the power to require a party to go out of the county of his residence. The section makes no exception in favor

Clark v. Dillon.

of counties in which the place of trial is placed. An examination before trial rests upon article 1 of title 3 of the Code, and that article restricts the place of examination to the county in which a person resides in all cases.

The order should be reversed, with costs and disbursements.

DYKMAN, J., concurs.

CLARK, RESPONDENT, v. DILLON, ET AL.,
APPELLANTS.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM,
MAY, 1882.

§ 500.

Instance of a denial in an answer which was held insufficient.—If a material allegation is not directly denied the court is warranted in assuming that no issue is made on it.

An answer must contain a general or specific denial of each material allegation of the complaint controverted by the defendant.* A denial in it of each and every allegation in the "complaint contained not hereinbefore specially admitted, qualified or denied," is a mode of denial which has been heretofore condemned, and is so loose and unsatisfactory as to warrant the court in wholly disregarding it. If a positive averment of a material fact is not worthy of a direct denial, the court is warranted in assuming that no issue is made on it.

* See on this subject *Miller v. McCloskey*, 1 *N. Y. Civ. Pro.* 252, and note; *Wooley v. Newcombe*, 9 *Daly*, 77; *Leary v. Boggs*, 8 *N. Y. Civ. Pro.* 227; *Sheldon v. Sabin*, 4 *Id.* 4; *McEncroe v. Decker*, 58 *How. Pr.* 250; *Haines v. Herrick*, 9 *Abb. N. C.* 379; *Calhoun v. Hallen*, 25 *Hun*, 155; *Smith v. Gratz*, 59 *How. Pr.* 274; *McGuinness v. The Mayor*, 13 *N. Y. W. Dig.* 522.

Clark v. Dillon.

Where in an action to recover damages for loss of services resulting from personal injuries received by plaintiff's wife through the failure of the defendant to properly surround with barriers and give notice of an excavation in the public streets, alleged to have been made by them, the answer alleged that the plaintiff's wife caused and contributed to the injuries received by her; that the plaintiff had "agreed to waive" his claim against the defendant; admitted the defendant's copartnership, and denied "each and every allegation in said complaint contained not hereinbefore specifically admitted, qualified or denied." *Held*, that this denial was problematical, leaving for opinion what should not be matter of doubt, and the court was warranted in disregarding its claimed effect; that neither the court nor the opposing counsel should be called upon to speculate upon what allegations of a complaint have been specifically admitted or denied, and what may or may not be qualified, is a proposition whereon there may be great divergence of opinion.

Where, in such case, the defendant's counsel asked the trial court to charge the jury that before the plaintiff could recover, they must determine that the defendant made the excavation as a matter of fact, no direct evidence having been given of that fact, and the court refused so to charge, holding that there was no denial of the allegation upon the subject in the complaint,—*Held*, no error, and that a judgment in favor of the plaintiff should be affirmed.

(*Decided June 5, 1882.*)

Appeal by defendants from a judgment against them entered upon the verdict of a jury.

The plaintiff being the husband of one Letitia A. Clark, brought this action to recover damages for the loss of her services resulting from personal injuries received by her through the negligence of the defendants.

The defendants, who were copartners, while sinking the road-bed of the New York and Harlem Railroad, had made a large excavation in Fourth avenue, near Sixty-third street, and had, on the night the plaintiff was injured, carelessly and negligently failed to surround such excavation with barriers, and had left it uncovered and unprotected, and had not provided any

Clark v. Dillon.

lights, signals, or other devices, to notify or warn persons passing along said street or avenue of its existence. The plaintiff's wife while lawfully passing along Sixty-third street, fell into said excavation, and was severely injured.

The answer set forth: "that the alleged injuries charged in said complaint as having resulted to Letetia A. Clark therein named were brought about, caused and contributed to by said Letetia A. Clark;" that in a prior action brought by said Letitia A. Clark, to recover damages growing out of the same accident, the husband had promised and agreed to waive any claim on his part, if the defendants would settle the action prosecuted by his wife, and that such settlement had been made, and that the defendants "admit the copartnership, . . . and deny each and every other allegation in said complaint contained, not hereinbefore specially admitted, qualified or denied."

On the trial the fact that the plaintiff's wife was injured in the manner alleged in the complaint was proved and evidence given to show what damage the plaintiff suffered thereby, but there was nothing to show that the defendants made the excavation and on that ground a motion was made by defendants to dismiss the plaintiff's complaint. The court denied the motion, and the defendants excepted.

The portion of the judge's charge which affects this appeal is as follows: "In this case, the plaintiff states in his complaint, that the defendants made the excavation in which Mrs. Clark fell, and at night time failed to guard it, and that their failure to guard it as it should have been guarded was an act of negligence on their part. The defendants in their answer, do not anywhere deny that they made the excavation, but they do say, that the accident would not have occurred if the wife of the plaintiff had not contributed to it by a want of care on her part. I do not regard that as a

Clark v. Dillon.

denial of the allegation of the complaint that the defendants did make the excavation, and they left it unguarded. I construe it to be a qualification of the complaint—a qualification to the extent of saying that it was the fault of Mrs. Clark that she fell in; and it being her fault, and she having contributed to the injury as well as the defendants, that the husband is not entitled to recover in this case. Therefore, I say, the question for you to decide is, not whether the defendants made this excavation,—for that, I think, is practically not denied, but the question is whether Mrs. Clark was guilty of a want of care on her part that occasioned the injury for which the husband sues.”

Upon the defendants’ request that the judge charge the jury, “That, before the plaintiff can recover, the jury must determine, as a matter of fact, that the defendants made, or caused to be made, the excavation into which the plaintiff’s wife fell,” the court said to the jury, “I say that is a question which I do not think is practically before you. As I construe the pleadings, it is fairly before you, that they did make that excavation,” and the defendants excepted.

The verdict of the jury was for the plaintiff.

Alexander Thain, for appellants.

T. C. Cronin, for respondent.

PER CURIAM.—BEACH, J.—The defendants’ counsel asked the trial court to charge the jury that before the plaintiff could recover, they must determine that defendants made the excavation as a matter of fact. No direct evidence was given of the fact. The learned judge held there was no denial of the allegation upon the subject in the complaint. The sufficiency of the pleading to raise such an issue, is the question presented by this appeal. An answer must contain a general or

Clark v. Dillon.

specific denial of each material allegation of the complaint controverted by the defendant (Code of Civil Procedure, § 500, subd. 1). This is a plain rule by which the pleading must be judged, and commends itself by simplicity, directness and the clearness resulting from adherence by the pleader. Under the text of the answer the denial is problematical, leaving for opinion what should not be matter of doubt. Neither court nor opposing counsel should be called upon to speculate upon what allegations of a complaint have been specifically admitted or denied, and what may or may not be qualified, is a proposition, whereon there may be great divergence of opinion. This mode of denial has been heretofore condemned and is so loose and unsatisfactory, as to warrant the court, as was done here, in wholly disregarding its claimed effect. Its use by the pleaders is for a drag net, to include what may possibly have been otherwise omitted. If a positive averment of a material fact is not worthy of a direct denial, the court is warranted in assuming that no issue is made upon it (*Miller v. McCloskey*, 1 *N. Y. Civ. Pro.* 252; *Hammond v. Earle*, 5 *Abb. N. C.* 105).

The judgment should be affirmed, with costs.

DALY, Ch. J., and VAN BRUNT, J., concurred.

McNulty v. Scolley.

McNULTY, APPELLANT, v. SCOLLEY, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT; GENERAL
TERM, OCTOBER, 1883.

§ 2366.

Agreement to arbitrate discontinues action.—Such agreement has this effect, although not acknowledged, and arbitrator does not consent to act.

The mere submission of a cause to arbitration operates as a discontinuance of an action for the same cause then pending; and that, although the arbitrators never acted. [³, ⁴, ⁵]

Where the parties to an action agreed, in writing, to leave their differences to three certain persons, as arbitrators whose decision should be final, and the agreement was signed by three witnesses, but was not acknowledged, and one of the arbitrators refused to act,—*Held*, that an order declaring the action discontinued, was properly granted; [⁶] that the agreement discontinued the action, and the fact that the agreement was not acknowledged as required by the Code (section 2366), or that an arbitrator refused to act, will not prevent this. [¹, ², ³]

Larkin v. Robbins (3 *Wend.* 505), followed. [⁴]
(Decided December 22, 1883.)

Appeal from an order declaring and ordering the action discontinued.

The opinion states the facts.

James M. Smith, for the appellant.

Albert Cardozo (*Richard S. Newcombe*, attorney),
for respondent.

The submission was a general one, and had the effect of discontinuing the action. *Wilson v. Williams*, 66 *Barb.* 209; *Resseque v. Brownson*, 4 *Barb.* 541; *Keep v. Keep*, 17 *Hun*, 153; *Jordan v. Hyatt*, 3 *Barb.* 275; *Larkin v. Robbins*, 2 *Wend.* 505.

McNulty v. Scolley.

And this is so, though the arbitrators never take or consent to take upon themselves the burden of the arbitration. See *Larkin v. Robbins*, *supra*, per MARCY, J.

The practice pursued by the defendant of moving for an order of discontinuance was the right course. *Smith v. Barse*, 2 *Hill*, 399; *Lorillard v. Phila. & N. Y. Nav. Steam Co.*, 1 *N. Y. Law Bulletin*, 12.

BRADY, J.—This is an action of slander, and appears to have been once tried and once partially tried. The complaint was once dismissed, and upon the subsequent investigation, and before it was concluded, a juror was permitted to be withdrawn on account of the illness of the counsel for the plaintiff. Subsequently the parties signed a paper as follows :

“We the undersigned, hereby agree to leave our differences to the above named parties, Shether, Connett and Silverman, as arbitrators, whose decision shall be final.

(Signed)

JAS. McNULTY.

JOHN B. SCOLLEY.”

“The within document was signed in our presence.

(Signed)

J. D. F. HERSEY.

N. B. DAY.

FRANK A. ELLIS.”

In May, 1883, the plaintiff was directed to show cause why an order should not be made declaring the action discontinued, and why such other or further order or relief should not be made in the premises as might be just.

The facts already stated as characterizing the litigation are set out in the affidavit of the plaintiff. It was admitted by him that on the 27th of April, 1883, he and the defendant met for the peaceful settlement of certain differences, at which meeting the witnesses whose names are subscribed to the agreement of

McNulty v. Scolley.

arbitration were present, and formed themselves into a committee. It was then suggested and advised that the paper already mentioned should be signed. The plaintiff averred that since the signing of the paper no action whatever had been taken by either of the persons named in the paper, they having been selected without their knowledge or previous consent, and that one of them, Mr. Shether, declared he would not act; and he further alleged that he was ready and willing to comply with the terms of the agreement. And the plaintiff also presented for the consideration of the court an affidavit showing that a person called upon the defendant asking him to name a time when he would meet the committee, and substantially that he had failed to do so. This was denied by the defendant, who said that what he did say was that he would not attend upon the days named because of his business, but further that if he could attend on one of the days named he would send word.

The submission to arbitration was therefore admitted. It is supposed by the appellant that the willingness of all the parties to act is an implied condition to the taking effect of the agreement, and that the refusal of the arbitrators to act leaves the parties in *statu quo*; and, further, that the agreement is defective as a binding agreement, because it was not acknowledged as required by the Code.* Both of these propositions are valueless. Whatever may be the effect of the refusal of the arbitrators to act in an arbitration where there is no pending action at law, and whatever ['] may be the effects of the provisions of the Code upon an arbitration made with reference to them, these effects do not control the question presented by this appeal.

* As to effect of failure to acknowledge, see *Lorenzo v. Deery*, 26 Hun, 447.

McNulty v. Scolley.

The provisions of the Code, however (see section 2366), evidently contemplate a submission to arbitration of any controversy existing between persons at the time of the submission which might be the subject of an action. The cases bearing upon the question of the effect of a submission to arbitration of differences when an action is pending have not declared that any peculiar form of acknowledgment is indispensable. It is enough that the parties have in writing agreed to a submission to arbitrators.* In this case such an agreement is admitted to have been made. The effect of such an instrument has been declared in a number of adjudicated cases. It is ['] to discontinue the action. And this seems to be the effect even if the submission was void (*Keep v. Keep*, 17 *Hun*, 152, where the cases are collated; see also *Barrett v. Western*, 66 *Barb.* 205).

Justice MARCY, in *Larkin v. Robbins* (2 *Wend.* 505), said that the general position is, that a submission of a cause pending in court is a discontinuance of the suit, that the reason the submission operates as a discontinuance is, not because the subject of the suit is otherwise disposed of than by the decision of the court in which it was presented, but because the parties have selected another tribunal for the trial of it.† And again: "The distinction that the plaintiff in

* See *Wilson v. Lane* (15 *Wend.* 99), as to effect of oral submission to arbitration on the subject-matter of a pending suit. See also *Resequie v. Brownson*, 4 *Barb.* 541; *West v. Stanley*, 1 *Hill*, 69.

† An agreement to discontinue is implied in all cases from the selection of another mode of adjustment of the liquidation, *Grosvenor v. Hunt*, 11 *How. Pr.* 355. Where, in the agreement to arbitrate, it was provided that "all suits now pending" should be suspended until the award of the arbitrators was made when the same shall be dismissed: *Held*, that an intent that the submission should not operate as an absolute discontinuance of the several actions then pending was indicated thereby; that the actions were suspended until the award was made, when the actions should be dismissed and that pending

McNulty v. Scolley.

error makes, between a submission never acted on by the arbitrators and one which has been followed by an award or hearing by the arbitrators, does not appear to have been recognized by the court, nor do I see any good reason for making such distinction. . . . It is the agreement which withdraws the cause from the court, and affects the discontinuance of the action."

And it was also said by the learned justice that ['] the point evidently for the consideration of the court was whether the mere submission of a case to arbitration, the arbitrators never taking or consenting to take upon themselves the burden of the submission, operated as a discontinuance of the suit pending in court.

As justly observed by the counsel for the respondent, the refusal or omission of either party to attend before the arbitrators would not alter the consent, inasmuch as upon proper notice the arbitrators could proceed in the absence of the defaulting party.*

It thus appears that upon the cases bearing upon the subject, the mere submission to arbitration ['] operates as a discontinuance of the action, and the order appealed from could not be reversed without in effect reversing these decisions.

It follows that the order should be affirmed.

DAVIS, P. J., concurred.

the arbitration they could be moved by neither party. *Ensign v. St. Louis Ry. Co.*, 62 *How. Pr.* 123.

* See Code of Civil Procedure, § 2368.

Hancock v. Sears.

HANCOCK, RESPONDENT, v. SEARS, APPELLANT.

COURT OF APPEALS, 1883.

§§ 2451, 2463.

Supplementary proceedings—judgment debtor who expends his personal earnings, due before the commencement of the proceedings and received thereafter, for the support of his wife and family, is not guilty of contempt.

Where the earnings of a judgment debtor for his personal services rendered within sixty days next before the institution of proceedings supplementary to execution, are necessary for the use of a family, wholly or partly supported by his labor, and which are therefore exempt from seizure, he need not bring the facts constituting exemption to the attention of the judge or court before applying his earnings to relieve the necessities of his family. The intent of the statute is answered by putting upon the debtor the burden of justifying its use when called upon to transfer the money to a sheriff or receiver. [1, 2]

Where a judgment debtor was forbidden by an order in proceedings supplementary to execution served, August 31, "from making or suffering any transfer or other disposition of or interference with his property, not exempt from levy and sale by virtue of an execution until further order in the premises," and it appeared upon his examination, that he had since the service of the order received and expended \$41.68, wages earned by him as a telegraph operator in the month of August, and upon being required to show cause why he should not be adjudged guilty of contempt in that he had interfered with his property, he showed by affidavit that he had a wife and two children dependent upon him and his labor; that the whole of his wages were not more than adequate for their support, that he paid \$20 of the money for rent "to prevent the expulsion of his family" from the house they occupied, and the balance in purchasing provisions and supplies needed for their subsistence. *Held*, that an order adjudging him guilty of contempt in receiving and using the money in question and fining him therefor was unwarranted [1] and should be reversed. [4]

Newell v. Cutler (19 Hun, 74) overruled; [2] Hancock v. Sears (29 Id. 96), reversed. [4]

(Decided June 26, 1883.)

Hancock v. Sears.

Appeal from an order of the supreme court, fourth department, affirming order in proceedings supplementary to execution made on September 12, 1882, by the county judge of Erie county, fining the appellant as for a contempt of court, in paying out earnings, received pending his examination, for personal services rendered within sixty days before the institution of such proceedings. Reported below, 29 *Hun*, 96.

The judgment in favor of plaintiff was for \$25 damages and \$2.90 costs and recovered in justice's court. A transcript thereof was filed in the county clerk's office, and execution issued to the sheriff, who returned the same wholly unsatisfied. The order in supplementary proceedings was served on August 31, and contained the usual injunction prohibiting the disposition of any money or property until the further order of the judge. It directed the appearance of the debtor for examination before a referee on September 7. The referee's report showed that the debtor was examined on September 7, and testified that he was paid on September 4, \$41.68, for wages due September 1, all of which except \$2.30 was compensation for services rendered before service of the order. The hearing was then adjourned to September 21, but on the day of the examination, September 7, the referee reported the testimony taken, and the plaintiff's attorney procured an order to show cause why the debtor should not be adjudged guilty of contempt of court in that he had interfered with his property and received and expended \$39.38 in violation of the injunction order. Upon the return of the order, the debtor appeared without counsel, having employed none so far, and asked an adjournment to the next day, when having retained an attorney, he showed for cause, that he was a telegraph operator, earning \$70 per month and occasionally more, when he was able to do overwork; that

Hancock v. Sears.

at the time of service of the order, he had not to exceed 50 cents in hand, but there was a balance due him for work done within ten days prior to the institution of these proceedings, including extra work done before that time, which with earnings subsequent to the service of the order, amounted to \$41.68. That he owed \$20 house rent; that his family needed provisions and supplies for subsistence which he could only obtain for cash; that the order required his appearance for examination one week after the service, and the necessities of his family would not permit him to await the examination and final appearance before the judge which the referee and plaintiff's attorney could protract at pleasure under the terms of the order; that in these circumstances he used the moneys so received in payment of rent to prevent the expulsion of his family from their home and for their subsistence, using no part of it in any other way; that it required all his earnings to support his family, consisting of a wife and two children—actual experience having shown that his wife's health will not permit her to do the housework and take care of the children also. Upon this, the county judge fined him \$35, the fine to be in satisfaction of the judgment and costs of these proceedings. An appeal was taken to the general term of the supreme court, where the order was affirmed, whereupon this appeal was taken.

Joseph P. Carr, for appellant.

George W. Wheeler, for respondent

DANFORTH, J.—The plaintiff, a judgment and execution creditor of the defendant to the extent of twenty-seven dollars and ninety cents, for the purpose of compelling his examination, instituted supplementary proceedings before the Erie county judge, on August 31,

Hancock v. Sears.

1882, and by his order then served the defendant was "forbidden from making or suffering any transfer or other disposition of, or interference with, his property not exempt from levy and sale by virtue of an execution, until farther direction in the premises." Upon his examination before a referee, it appeared that he had no money, although he received on the 4th of September, 1882, \$41.68, for wages earned by him as a telegraph operator in the month of August. These facts being reported, the judge required the debtor to show cause why he should not be adjudged guilty of contempt in that he had interfered with his property and received and expended the money referred to. On the return of this order, the debtor showed by affidavit that he had a wife and two children dependent upon him and his labor, that the whole of his wages were not more than adequate for their support, that he paid \$20 of the money for rent, "to prevent the expulsion of his family" from the house they occupied and the balance in purchasing provisions and supplies needed for their subsistence. The debtor was nevertheless adjudged guilty of contempt in receiving and using the money in question, and fined the sum of \$35, which he was directed to pay to the plaintiff's attorney, who, upon such payment, was required to satisfy the judgment on which the proceedings hung.

We think the order was unwarranted. The ['] proceedings were under title 12, chapter 17, article 1 of the Code of Civil Procedure, entitled "Proceedings supplementary to an execution against property." This statute declares that the article referred to does not authorize the seizure of, or other interference with the "earnings of the judgment debtor for his personal services rendered within sixty days next before the institution of the proceedings," where it is made to appear by his oath or otherwise, that these earnings are necessary for the use of a

Hancock v. Sears.

family wholly or partly supported by his labor ['] (§ 2463). Such was the case here. Nor was it necessary for the debtor to bring the facts constituting exemption to the attention of the judge or court before applying his earnings to relieve the necessities of his family. Such a course would cause delay, perhaps suffering to his family, and we think the intent of the statute is answered by putting upon the debtor the burden of justifying its use when called upon to transfer the money to a sheriff (§ 2447), or a receiver (*Id.*). Here no receiver had been appointed ; nor could one be until, upon the examination of the debtor, or otherwise, property applicable to payment of the judgment was discovered. Failing in that, the creditor might be required to pay costs to the debtor (§ 2456). But if he succeeded, the creditor could have neither debt nor costs, save from such property as might come to the hands of the sheriff or receiver (§ 2455.) Moreover, before a receiver could be appointed, the debtor must be given at least two days' notice of the application, and it would be sufficient if upon the hearing he showed cause why his earnings should not be seized or interfered with.

In the case before us the creditor by a short cut has evaded the liability and the conditions of these provisions, without discovering property applicable to the payment of the judgment, or being entitled to a receiver. He not only avoids payment of costs to the debtor, but has secured his debt by the imposition of a fine and the possible imprisonment of the person of his debtor, thus not only defeating the humane policy of the law which permits the application of the debtor's earnings to the support of his family, but depriving him during the discretion of the judge of the opportunity of earning more. We are referred by the respondent to *Newell v. Cutler* (19 *Hun*, 74), as a ['] case supporting the order appealed from. It is

Bengtson v. Thingvalla Steamship Co.

properly cited to that end, but it goes upon the theory that the debtor should have left his wages uncollected until the injunction was dissolved, or supplementary proceedings closed. That does not seem to be the policy of the law. and we think the debtor should not be required to waste the fruits of his labor in litigation over the order, or leave in the hands of his employer money to which the creditor could not be entitled, and the use of which the support of his family requires.

The order of the supreme court and county ['] judge should be reversed and the motion to punish the debtor for contempt be denied, with costs, and costs of this appeal.

All concur, except ANDREWS, J., absent.

BENGTSON, RESPONDENT, v. THINGVALLA
STEAMSHIP COMPANY, APPELLANT.

SUPREME COURT, SECOND DEPARTMENT; GENERAL
TERM, SEPTEMBER, 1883.

§ 1776.

To raise an issue as to the incorporation of a defendant, there must be an affirmative allegation that it is not a corporation.—A denial which merely puts in issue its nationality is insufficient.

Where it was alleged in the complaint that the defendant was a foreign corporation incorporated under the laws of the kingdom of Denmark, and was a common carrier of passengers, and the defendant appearing in its own name, which is apparently a corporate name, admits that it is a common carrier of passengers, but denies on its information and belief that it is a foreign corporation as

Bengtson v. Thingvalla Steamship Co.

alleged in the complaint,—*Held*, that there was no issue made, which required the plaintiff to prove the corporate existence of the defendant; that the only issue made is one of the nationality of the corporation, which is immaterial, while the Code requires an affirmative denial of the fact that the defendant is a corporation.

Bengtson v. Thingvalla Steamship Co. (3 *N. Y. Civ. Pro.* 263), affirmed.

(Decided December 10, 1888.)

Appeal from judgment entered upon the verdict of a jury and from an order denying a motion upon the minutes for a new trial. Reported below, 3 *N. Y. Civ. Pro.* 263.

This action was brought to recover \$82.50, the value of a certain trunk and contents delivered by the plaintiff to the defendant, at Malmo, Sweden, for the purpose of being conveyed for her to the city of New York, but which through the carelessness and negligence of the defendant was wholly lost to plaintiff. The complaint alleges that the defendant was "a foreign corporation created by and under the laws of the government of Denmark, and having an office in the city of New York, and . . . was . . . a common carrier of passengers and their baggage, for hire."

The answer, omitting the formal parts, was as follows :

"First. The defendant denies on its information and belief that at the time mentioned in the complaint, or at any other time, the defendant was a foreign corporation, as is alleged in the complaint, and defendant denies that it has an office in the city of New York.

"And further answering, the defendant admits that it is a common carrier of passengers.

"And further answering, the defendant denies each and every allegation in the complaint contained, not hereinbefore expressly admitted, answered or denied.

"Second. For a second and separate defense, the

Bengtson v. Thingvalla Steamship Co.

defendant alleges on information and belief that it is not and never was a corporation.

"Third. For a third and separate defense this defendant alleges, on its information and belief, that the said plaintiff never delivered to the defendant the baggage mentioned and described in the complaint, and defendant never received the same.

"Fourth. For a fourth and separate defense, this defendant alleges, on information and belief, that the loss of the baggage referred to in the complaint, if any such loss occurred, was not occasioned by any negligence, carelessness or improper conduct on the part of the defendant, its agents, servants or employees, and the defendant denies any knowledge or information sufficient to enable it to form a belief as to whether said baggage was ever lost to the plaintiff."

On the trial there was no direct evidence of the incorporation of the defendant, and at the close of plaintiff's case the defendant's counsel moved to dismiss the complaint, on the ground, among others, that the incorporation of the defendant was not shown, and that there was no competent evidence on that subject, which motion was denied and an exception duly taken.

The court submitted the case to the jury and charged them that they "must find, in the first place, on the testimony produced here whether this is a corporation and holding itself out to the world" to be such.

The verdict of the jury was in favor of the plaintiff for \$82.50.

The defendant's counsel thereupon moved for a new trial upon the minutes of the court, on the ground that the verdict was against the evidence, and also on the exceptions taken during the trial.

After argument and consideration the court denied the motion, writing an opinion which is reported, 3 *N. Y. Civ. Pro.* 263.

Bengtson v. Thingvalla Steamship Co.

This appeal is from the judgment and order denying motion for a new trial thereupon entered.

Joseph A. Shoudy (Jas. K. Hill, Wing & Shoudy, attorneys), for appellant.

The learned judge at circuit placed his decision denying the motion for a new trial upon the ground that the plaintiff was not bound to prove the incorporation of the defendant, for the reason that the non-existence of the incorporation was alleged on information and belief, and not positively . . . It is simply impossible, under the ruling of the learned judge, that the fact of the existence of a foreign corporation shall ever be litigated, or put in issue, unless, indeed, the extraordinary expedient should be resorted to of having the answer verified in a foreign country. That is obviously impracticable in any case, and often impossible.

It is simply impossible that an agent, residing here, of a steamship owned abroad, should be able to answer truthfully and positively, of his own knowledge, that his principal is not a foreign corporation. All that he can do, honestly, is to allege, on his information and belief, the non-existence of such corporation.

J. Edward Swanstrom, for respondent.

The plaintiff was not required to prove the incorporation of the defendant, unless the answer contained an affirmative allegation that the defendant was not a corporation. Code of Civ. Pro. §1776 . . . The defendant is bound to know whether it is or is not a corporation, and if it is not, it should plead that fact expressly and not on information and belief . . . *East River Bank v. Rogers*, 7 *Bosw.* 497, and cases cited.

BARNARD, P. J.—There was no issue made by the answer, which required the plaintiff to prove the cor-

Bengtson v. Thingvalla Steamship Co.

porate existence of the defendant. The complaint averred that the defendant was a foreign corporation incorporated under the laws of the kingdom of Denmark and was a common carrier of passengers. The defendant appears in its own name, which apparently is a corporate name, and admits that "it is a common carrier of passengers," but "denies on its information and belief that at the time mentioned in the complaint or at any other time, the defendant was a foreign corporation *as is alleged in the complaint.*" The denial, such as it is, is not absolute, but upon information and belief, and especially fails to meet the real allegation. Was it a corporation under the laws of Denmark or of any other state? If Swedish the allegation in the complaint that it was Denmark would be of no relevancy. The denial is so framed that the defendant can be either a foreign or a domestic corporation formed in any country except Denmark. The only issue made is one of nationality of the corporation. The Code, section 1776, requires an affirmative denial of the fact that the defendant is a corporation.

The judgment is therefore right, and should be affirmed, with costs.

DYKMAN and PRATT, JJ., concur.

Doyle v. Doyle.

DOYLE v. DOYLE.

SUPREME COURT, THIRD DEPARTMENT, DELAWARE
COUNTY, SPECIAL TERM, DECEMBER, 1883.§§ 8 *et seq.*, 14, 110 *et seq.*, 3307.

*Sheriff's fees—plaintiff must pay fees for executing warrant of commitment in proceedings to punish defendant for civil contempt—
Otherwise where the offense is a criminal contempt, in
which case such fees are a county charge—Sections 110
et seq. of the Code do not apply to proceedings to punish for civil contempt.*

Where, in an action for divorce, the plaintiff recovered a judgment by default by which the defendant was directed to pay her a certain amount of costs, which he was ordered, after notice, to pay but refused to do, and he was adjudged guilty of a contempt of court and he was arrested and committed to jail, and after having been confined a few days, paid to the sheriff the amount he was required by the warrant to pay;—*Held*, that the contempt of which the defendant was guilty was a civil and not a criminal contempt; [¹, ²] that the sheriff's fee for serving the warrant was not a county charge [³] but was a proper and just charge against the plaintiff in the action by whom he was employed to execute the mandate and for whose benefit he performed the service; [⁴, ⁵] and she was clearly liable to him therefor.[⁶] In such a case the law assumes that the expenses of the plaintiff have been covered by the fine.[⁷]

Where an order is made in a civil action requiring the defendant to pay costs awarded by a final judgment and he refuses to do so and a warrant for his commitment is issued, under section 14 of the Code of Civil Procedure the warrant is no part of a special proceeding, but is a proceeding in the action, conducted by the plaintiff and for his benefit, [¹, ²] and he is liable to the sheriff for his fees for executing it.[³] Sections 110 *et seq.* of the Code, which relate to the execution by the sheriff of a mandate against the person, have no application to such proceeding.[⁴]

It seems, that the sheriff's fees for the service of any process or mandate in the enforcement of those provisions of the Code of Civil Procedure which provide for the punishment of a criminal con-

Doyle v. Doyle.

tempt would be a charge against the county as other services in criminal matters and would not be a charge against the individuals concerned therein.[¹]

Decided December 28, 1883.)

Motion by plaintiff that the sheriff of Delaware county be directed to pay her the costs of this action received by him from the defendant while the latter was under arrest for failing to pay the same.

The opinion states the facts.

Stephen C. Johnson, for plaintiff.

W. H. Douglass, sheriff, in person.

MURRAY, J.—This was an action for a divorce on the ground of adultery. The defendant did not answer or demur. The plaintiff obtained a judgment. The final judgment directed the defendant to pay the plaintiff a certain amount of costs. On the return of an order to show cause, the defendant was ordered to pay them, and he refused to do so.

A warrant of commitment was then issued and delivered to the sheriff of Delaware county. The sheriff arrested the defendant and brought him to jail, and confined him a few days, and he paid the amount required to be paid by the warrant, to the sheriff.

The sheriff deducted about the sum of ten dollars, being the amount of his fees for serving the warrant, and tendered the balance to the plaintiff's attorney. He refused to receive it, and demanded the whole amount, and denied the plaintiff's liability to the sheriff for his fees, and claimed the sheriff must look to the county alone for them.

That presents the only question on this motion, whether the plaintiff or the county is required to pay the sheriff his fees on that warrant, and for receiving

Doyle v. Doyle.

the defendant into the jail. The warrant was issued against the defendant, for the reason he had been adjudged guilty of a contempt of court in refusing to pay that money.

There are two classes of contempts. One is contempts in the progress of an action or special proceeding; the other is, criminal contempts of court.* The first is defined by section 14 of the Code of Civil Procedure, and clearly covers the proceedings in this action out of which this question arose.

The mode of enforcing the provisions of said section, and also section 8, is provided for by section 2266 of the Code of Civil Procedure, and the sections following thereto.

The second class above referred to is defined in section 8 of the Code of Civil Procedure, and the sections following thereto, and provides for the punishment of criminal contempts, which may also be punished by indictment and conviction. That constitutes an entirely different class of contempts from those provided for in section 14, and all are misdemeanors.

They involve matters affecting the public welfare, and the peace and good order of society, and the dignity and respect due to our courts of justice, and the public have an interest in the enforcement thereof.

I am, therefore, clearly of the opinion, that the ['] sheriff's fees for the service of any process, or mandate in the enforcement of those provisions of section 8, &c., would be a charge against the county, as other services in criminal matters, and would not be a charge against the individual concerned therein.

That none of these provisions cover the proceedings in this case. Section 14 provides as follows,

* The distinction between a civil and a criminal contempt is considered at length in *People ex rel. Negus v. Dwyer*, 2 *N. Y. Civ. Pro.* 879, and in *People v. Aiken*, 19 *Hun*, 327.

Doyle v. Doyle.

viz.: "A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty or other misconduct by which a right or remedy of a party to a civil action or special proceeding pending in the court may be defeated, impaired, impeded or prejudiced in either of the following cases." Among other things, subdivision 3 provides for a case like the present, when a party to an action refuses to pay money when ordered and adjudged so to do by a competent court.

None of the provisions in this section are criminal contempts. The offender could not be indicted and tried for a crime as he could be under the provisions of section 8.

Section 14 clearly provides for the enforcement of a private remedy for the sole benefit of a private individual. The public have no interest in the enforcement thereof. To illustrate: take this case, the whole proceeding is under the control of the plaintiff; through her counsel she conducts them. The money he refused to pay is adjudged to belong to her, and is for her costs in the action. It is directed to be paid to her. She is to have the entire benefit of the entire proceeding. She employs the sheriff to execute a mandate for her benefit, and he performs the services under her employment. That being so, the sheriff's fee for serving the warrant of commitment is not a county charge, but is a proper and just charge against the plaintiff in the action.

This warrant served by the sheriff was no part of a special proceeding, but was a proceeding in the action.

It being a part of the proceedings in an action conducted by the plaintiff for her benefit, it is clear she is liable to the sheriff for his services. Section 3307 provides for the fees for sheriffs in civil actions or special proceedings. Subdivision 7 of that section provides for his fees on an execution, a warrant of attachment, or an

Doyle v. Doyle.

attachment for the payment of money in an action or special proceeding. Subdivision 14 provides that for each person committed to prison or discharged from prison in an action or special proceeding, he shall receive one dollar, to be paid by the person at whose instance he is imprisoned.

In the case like the present, the law assumes that the expenses of the plaintiff have been covered by ['] fine. I think this is fair to be inferred from sections 2266, 2267, 2268, 2269, 2281, 2283, 2284, of the Code of Civil Procedure.

The warrant of attachment clearly shows that ['] it was a proceeding in the action, and that there was no adjudication that the refusal to pay the money was willful. That section 110 of the Code ['] and those following, as amended by chapter 405, Laws 1883, has no reference to a proceeding like the present, and is not applicable thereto.

There should be an order entered in this case requiring W. H. Douglass, sheriff, Delaware county, to pay to the plaintiff's attorney the amount of money received by him from the defendant in this action, less his fees for serving warrant of commitment, and for receiving the defendant into the jail.

The plaintiff's counsel likens the sheriff's fees for serving this warrant to his charges for boarding the defendant while in jail. The two charges are not analogous. The county has furnished a jail in which to confine, board and care for all persons that are required by law to be imprisoned therein. The county supplies and sustains that institution, which is for the common benefit of the people of the county, and is supported by taxation upon the taxable property of the inhabitants of the county, and no individual is liable to the sheriff for boarding a prisoner that he causes to be confined in jail, unless there is a statute to that effect. There is no statute requiring the plaintiff to pay for the board of

Thompson v. Schieffelin.

the defendant while he was in jail. It is entirely different from sheriff's fees for services performed by him in serving and enforcing the mandates of the court.

He is the executive officer of the county. He has no salary, his only compensation is for services performed by him, and the statute provides a compensation for each service done by him as sheriff.

The amount of his compensation is fixed by law in each case, and when he performs services at the request and for the benefit of private individuals, they are required to pay him unless it is otherwise provided by statute.

THOMPSON, RESPONDENT, v. SCHIEFFELIN,
APPELLANT.

CITY COURT OF NEW YORK, GENERAL TERM,
DECEMBER, 1883.

§ 1021.

Order overruling demurrer as frivolous not appealable.

An appeal does not lie from an order overruling a demurrer to a complaint as frivolous, and granting judgment, with the privilege to the defendant to plead anew; the remedy is by an appeal from the judgment, final or interlocutory, entered upon the demurrer.

The unsuccessful party to an action may, if the successful party neglects to enter the proper judgment, enter it himself in order to appeal therefrom.

Cambridge Valley National Bank v. Lynch (76 N. Y. 514), followed.
(Decided December 20, 1883.)

Appeal from an order made at Special Term, overruling a demurrer to the complaint herein as frivolous, and granting judgment to plaintiff, unless the defendant within five days serve an answer to the complaint, and pay the plaintiff's costs to date.

Thompson v. Schieffelin.

After the order appealed from was entered, the costs of the plaintiff were taxed by the clerk, upon notice to defendant's attorney, at \$58.11. The defendant did not pay costs and answer, and judgment has not been entered.

On the last day of the time allowed defendant to answer under the order, he obtained an order staying plaintiff from entering judgment in accordance with the order overruling the demurrer, pending this appeal.

Edwin R. Meade, for appellant.

James M. Hunt, for respondent.

An order overruling a demurrer is neither such as section 1347 of the Code describes as appealable to the General Term, nor an interlocutory judgment within section 1349 of the Code. An appeal can only be taken from the judgment entered in accordance with the order. *Cambridge Valley National Bank v. Lynch*, 76 *N. Y.* 514; *Adams v. Fox*, 27 *N. Y.* 640; *Garner v. Harmony Mills*, 6 *Abb. N. C.* 212; *Miller v. Sheldon*, 15 *Hun*, 220; *Lacustrine, &c. Co. v. Lake Guano Co.*, 16 *Hun*, 484; *Liegeois v. McCracken*, 22 *Hun*, 69; *Cameron v. Equitable Life Ass. Soc.*, 9 *N. Y. Weekly Dig.* 26; *Joannes v. Day*, 3 *Robt.* 650; *Whitman v. Nicholl*, 16 *Abb. Pr. N. S.* 329.

The order overruling the demurrer and giving defendant leave to answer within five days on payment of costs cannot be appealed from.

The practice is to enter judgment on default of answer or payment, and then appeal from the judgment. *Trust and Deposit Co. of Quandaga v. Pratt*, 25 *Hun*, 23; *Smith v. Rathbun*, 88 *N. Y.* 660; *Cook v. Warren*, 88 *N. Y.* 37; *Garner v. Harmony Mills*, 6 *Abb. N. C.* 212 224; *Malcolm v. N. Y. Cotton Ex.*, 47 *N. Y. Supr. (J. & S.)* 558; *Cambridge Val. Nat. Bk. v. Lynch*, *supra*.

Thompson v. Schieffelin.

Had the order given judgment absolute without leave to amend by serving an answer, the case would have been otherwise. *Elwood v. Roof*, 82 *N. Y.* 428.

HYATT, J.—This is an appeal from an order made at Special Term, overruling a demurrer to the complaint as frivolous, and granting judgment, with the privilege to the defendant to plead anew, which by this appeal he declines to accept. An appeal does not lie from this order.

The decision was, as urged by the appellant, under section 1021, Code of Civil Procedure, under which the rule was settled by the court of appeals in the case of *Cambridge Valley National Bank v. Lynch*, 76 *N. Y.* 514, wherein the court held that under this Code, as under the former Code, the decision of the court overruling or sustaining a demurrer was an order and not an interlocutory judgment, and that this Code did not provide for any appeal therefrom; the remedy is therefore by appeal from the judgment, final or interlocutory, entered upon the demurrer.

The unsuccessful party may, if the successful party neglects to enter the proper judgment, enter it himself in order to appeal therefrom. *Wilson v. Simpson*, 84 *N. Y.* 674.

In this case the defendant not only declines to plead anew, but also either to enter the judgment as directed, or permit the plaintiff to do so, having stayed all action on his part in the premises.

If the order is not appealable, it is unnecessary to consider whether or not the demurrer is frivolous.

The appeal must be dismissed with costs.

HALL, J., concurred.

Cromwell v. Spofford.

CROMWELL v. SPOFFORD.

CITY COURT OF NEW YORK, CHAMBERS, NOVEMBER,
1883.

§ 2435.

Proceedings supplementary to execution.—Judgment debtor cannot be examined in, when an order for his examination in proceedings brought on another judgment between the same parties is outstanding, and it does not appear that he has subsequently acquired property.

Where a judgment creditor seeks to examine his judgment debtor in proceedings supplementary to execution, and an order for the examination of said debtor in proceedings based upon a prior judgment between the same parties was outstanding, and no reference was made in such second proceedings to the existence of the previous order, and there was no allegation of subsequently acquired property,—*Held*, that he was not entitled to the examination sought.

(Decided November 8, 1888.)

Motion to vacate and set aside an order for the examination of the defendant in proceedings supplementary to execution.

The facts are sufficiently stated in the opinion.

Ebarts, Southmayd & Choate, for the motion.

Conlan & McCrea, opposed.

HAWES, J.—An order of examination is now outstanding, based upon a prior judgment between the same parties. No reference whatever is made herein to the existence of this order, and there is no allegation of subsequently acquired property. Under such circumstances I do not think that the plaintiff is entitled

Keiher v. Shipherd.

to the examination now sought (see *Canavan v. McAndrew*, 20 *Hun*, 46; *Grocers' Bank of N. Y. v. Bayaud*, 21 *Id.* 203).

KEIHER v. SHIPHERD.

CITY COURT OF NEW YORK; CHAMBERS, DECEMBER,
1883.

§ 1391.

Supplementary proceedings.—Share in N. Y. Law Institute owned by practicing lawyer, when exempt from judgment creditor.

Where in proceedings supplementary to execution, it appeared that the judgment debtor was the owner of one of the shares in the "New York Law Institute" of the value of \$150; that he was a lawyer in active practice, and such share, and the privileges it confers, constituted his necessary working tools and library as a member of the legal profession, *Held*, that such share was exempt from judgment creditors, and a motion for a receiver of the property of such judgment debtor founded on the ownership of such share should be denied.

(Decided December 10, 1883.)

Motion by plaintiff for the appointment of a receiver of the property of the defendant in proceedings supplementary to execution.

The plaintiff having recovered a judgment against the defendant, and an execution issued thereon to the sheriff of the proper county, having been returned wholly unsatisfied, procured an order in proceedings supplementary to execution for the examination of an officer of the New York Law Institute, a corporation, pursuant to section 2441 of the Code of Civil Procedure on the ground that said corporation had property of

Keiher v. Shipherd.

the judgment debtor exceeding in value \$10. On the examination under such order it appeared that the defendant was the owner of one of the original shares of the New York Law Institute, the market value of which was \$150.

The plaintiff thereupon made this motion.

Further facts are stated in the opinion.

Peckham & Tyler, for the motion.

Jacob R. Shipherd, opposed.

MCADAM, J.—The examination of the assistant librarian proves that the judgment debtor has standing in his name, one of the original shares of the "New York Law Institute," of the value of \$150. The plaintiff on this discovery applies for the appointment of a receiver. The defendant opposes the motion, and proves that he has a family for which he provides; that he is a lawyer in active practice, and that such share and the privileges it confers constitute his necessary working tools and library as a member of the legal profession. Under such circumstances the aforesaid share is exempt from judgment creditors (*Code*, § 1391; *Robinson's Case*, 3 *Abb. Pr.* 466). The statute in question is a remedial one, and must be liberally construed in favor of the debtor on grounds of public policy, as every state has an interest in the welfare of its citizens (see *Shaw v. Davis*, 55 *Barb.* 389; *Becker v. Becker*; 47 *Id.* 497; *Smith v. Slade*, 57 *Id.* 637; *Wilcox v. Hawley*, 31 *N. Y.* 648; *Stewart v. Brown*, 37 *Id.* 350; *Frost v. Mott*, 34 *Id.* 253; *Cantrell v. Conner*, 51 *How. Pr.* 45).

The property being exempt, the application for the appointment of a receiver must be denied. No costs.

Greenbaum v. Dwyer.

GREENBAUM ET AL. v. DWYER ET AL.

SUPREME COURT, FIRST DEPARTMENT; SPECIAL
TERM, DECEMBER, 1883.

§§ 438, 439.

Service by publication.—Letters or papers referred to in affidavit to obtain order for, should be annexed.—Instance of an affidavit which was held insufficient to show that the defendants could not by due diligence be served within the state.

Where the affidavit on which an order for the service of a summons by publication was granted, recited "that as deponent is informed and believes, the defendants . . . are not residents of this state, but reside in the city of Laredo, state of Texas, as deponent is informed by the defendants themselves in letters received from them at said place;" also "that deponent has caused a summons and complaint to be issued in this action against the said defendants to the sheriff of the city and county of New York, but that said defendants cannot be found after due diligence within this state, and that deponent is informed, and believes that said defendants are now in the city of Laredo, state of Texas," and the complaint stated that "the defendants are, and at all the times hereinafter mentioned were, copartners doing business in the city of Laredo, state of Texas, under the firm named, or style of Thomas Dwyer & Co.," and these were all the allegations in the papers on which the order was granted showing the inability of the plaintiffs, with due diligence to make personal service upon the defendants of the summons within the state, *Held*, that the motion should be granted; that inasmuch as the letters referred to or copies thereof were not annexed to the affidavits, the plaintiff's case was not strengthened upon the question of due diligence by a simple reference to them [¹, ²]; that the affidavit, that the summons and complaint had been issued to the sheriff, and that the defendants cannot be found after due diligence within this state, when it did not state that the sheriff has so informed the deponent, and in the absence of any certificate by the sheriff, showing that he has made any efforts to serve them, was insufficient. [³]

Letters or documents relied upon in procuring a provisional remedy, or copies thereof, should be annexed to the moving papers, and in

Greenbaum v. Dwyer.

their absence a reference to them in the moving affidavit does not strengthen the plaintiff's case.[¹,²]

De Meerth v. Feldner (16 Abb. Pr. 295); [¹] Carleton v. Carleton (83 N. Y. 818); [²] followed; Smith v. Mahon (3 N. Y. Civ. Pro. 55), distinguished.[⁴]

(Decided December 10, 1888.)

Motion to vacate an order directing that the summons herein be served by publication.

The facts are stated in the opinion.

Forbes & Sage for the motion.

Gilbert R. Hawes opposed.

LAWRENCE, J.—The application in this case is to vacate an order directing the service of the summons by publication, on the ground that the affidavit on which the same was obtained was insufficient to justify the granting of the order. The affidavit recites, "that as deponent is informed and believed the defendants, Thomas Dwyer and Joseph W. Bell, are not residents of this state, but reside in the city of Laredo, State of Texas, as deponent is informed by said defendants themselves in letters from them at said place." Also, "that deponent has caused a summons and complaint to be issued in this action against defendants to the sheriff of the city and county of New York, but that said defendants cannot be found after due diligence, within this State, and that deponent is informed and believes that said defendants are now in the city of Laredo, State of Texas." The complaint in the action states that the "defendants are and at all times herein-after mentioned were copartners doing business in the city of Laredo, State of Texas, under the firm name or style of Thomas Dwyer & Co." These are all the allegations in the papers on which the order of publication was granted, showing the inability of the plaintiff with due diligence to make personal service upon the

Greenbaum v. Dwyer.

defendants of the summons within this State. Under the old Code of Procedure the affidavit would have been plainly insufficient (see *Wortman v. Wortman*, 17 *Abb. Pr.* 66, and cases cited in the opinion of SUTHERLAND, P. J.; *Peck v. Cook*, 41 *Barb.* 549; *Brady v. Smith*, 3 *Hun*, 60, opinion of DAVIS, P. J.). I was inclined on the argument to the opinion that under section 439 of the Code of Civil Procedure, the affidavit in this case might be deemed to be sufficient, inasmuch as it referred to the letters received from the defendants themselves at the city of Laredo. Subsequent reflection and an examination of the section in question lead me to the conclusion that this impression was erroneous. The letters relied on to establish that the defendants were non-residents at the time the order was made, are not attached to the affidavit, nor are even their dates given. The reference to them, therefore, in the affidavit furnishes no proof that they establish that the defendants could not with due diligence be personally served with the summons in this State. In [*De Meerth v. Feldner* (16 *Abb. Pr.* 295) the general term of the common pleas held that where documents are relied upon in an affidavit presented for the purpose of obtaining a provisional remedy, the documents themselves or copies thereof must be furnished to the court. In the absence of such letters or copies thereof, [*the plaintiff's case was not strengthened upon the question of due diligence by a simple reference to them in the affidavit. The plaintiff's affidavit, as we have before seen, shows that the summons and complaint have been issued to the sheriff of the county, and alleges that the defendant cannot be found after due diligence in this State, and the deponent is informed and believes that said defendants are now in the city of Laredo, State of Texas. It does not state that the sheriff has so informed the deponent, nor does the sheriff make any affidavit showing that he has made*

Greenbaum v. Dwyer.

any effort to serve the summons and complaint upon the defendants within this State. I cannot, therefore, distinguish this case from that of *Carleton v. Carleton* (85 *N. Y.* 315). In that case the cases of *Belmont v. Cornen* (82 *Id.* 256), and *Howe Machine Co. v. Pettebone* (74 *Id.* 68), which are relied upon by the plaintiff's counsel, are commented upon and distinguished, and ['] the decision in the former case was supported on the ground that the affidavit therein, contained allegations intending to show that an effort had been made to find the defendant within the State and he was not there, and hence it conferred jurisdiction upon the court or judge to pass upon the question of the sufficiency of the proof; and in the latter case it appears that there was a certificate of the sheriff that he had used due diligence to find the defendant, for the purpose of serving the summons upon him, and from the best information that he could obtain he learned that he had left the State. No such feature exists in the case now under consideration, nor, as I view it, is any fuller information imparted by the affidavits than was presented in the case of *Carleton v. Carleton* (*supra*), where the affidavit stated that the defendant "has not resided within the State of New York since March, 1877, and deponent is informed and believes that the defendant is now a resident of San Francisco, California." The plaintiff relies upon the case of *Smith v. Mahon* (2 *N. Y. Civ. Pro.* 55), decided by the general term of this department. In that case, however, the motion was ['] made by a non-resident and a junior attaching creditor, and a *quære* was expressed as to whether the affidavit could have been sustained if the motion had been made by the debtor himself (see opinion DAVIS, P. J., on concurring in the opinion of BRADY, J.; DAVIS, P. J., and BRADY, J., only being present). I do not regard that case, therefore, as being in point, and shall follow

 Estate of Slosson.

the decision of the court of appeals in *Carleton v. Carleton*, already referred to.

Motion granted, with \$10 costs to abide event.

ESTATE OF JOSEPHINE SLOSSON, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, OCTOBER,
1883.

§§ 2736, 2811.

Commissions of testamentary trustees.—When allowed.—Amount of, when fund originally less than \$100,000 was increased to more than that sum by income.—Such commissions the same as those allowed to executors.

Where a testator's will made express provision for the setting apart of a fund, the income of which was to be paid to a certain beneficiary for life, and it appeared on the settlement of the accounts of the trustees of such fund, who were also executors of the will, that the decree on an accounting as such executors previously had, showed that the separation had, in fact, been made,—*Held*, that the accounting parties were entitled to commissions as such trustees, although they had also received commissions as executors. [1]

Where the principal of a fund, when delivered to certain testamentary trustees, was less than \$100,000, but at the time of their accounting it amounted with the income thereon to more than that sum,—*Held*, that the trustees were entitled to receive such commissions only as would have been grantable to one of their number in case he had been sole trustee. [2]

The rate at which the commissions of a testamentary trustee should be computed are the same as that which is applicable to executors in like cases, and this as regards both income and principal. [3] For the purpose of fixing the rate for computation of such commissions upon income, such income must be regarded as an addition to the principal, and if the commissions have been awarded upon the principal on a basis of five, two and a-half, and one per cent., no greater compensation than at the rate of one per cent. can be allowed upon the income received and paid out. [4]

Estate of Slosson.

In re Leggett (3 Redf. 149); [*] *Cram v. Cram* (3 Id. 244); [*] *Ward v. Ford*, 4 Id. 84), [*] distinguished.

(Decided October 20, 1883.)

Settlement of the accounts of testamentary trustees.

The opinion states sufficient facts.

Evarts, Southmayd & Choate, and *Thomas T. Sherman*, for the trustees.

Stephen A. Walker, for the *cestui que trust*.

ROLLINS, S.—The trustees of a certain fund, the income of which was given by decedent's will to a beneficiary for life, have filed their account, and a decree settling the same is about to be entered.

Upon this settlement the following questions are presented for determination :

1st. Are the accounting parties, who have already, in their capacity as executors, received commissions from this fund, entitled upon the present accounting to be awarded commissions as trustees ?

2. If so entitled, should *each* of them be allowed the commissions which he could justly have claimed, had he been *sole* trustee, for receiving the principal which is still held in trust, and for receiving and paying out the income ?

3. If *such* commissions cannot be allowed, then at what rate per cent. should commissions be granted upon the income about to be distributed ?

First. I hold that the parties accounting are now entitled to commissions upon the principal of the trust fund as well as upon the income. The testator's will

[*] made express provision for the setting apart of the fund in question, and directed that after its separation from the body of the estate it should be held in trust by the executors as trustees for the beneficiary. The accounts previously filed herein, and the decree settling the same, show that the separation directed by the will was in fact effected, and that after such separation the

Estate of Slosson.

executors continued to hold and manage the fund as trustees.

Second. The amount of the principal of this fund is less than \$100,000, but it is claimed that as the principal and income, taken together, are in excess of that sum, each trustee is entitled, under sections 2811 and 2736 of the Code of Civil Procedure to one-half commissions for receiving the principal and to full commissions for receiving and disbursing the income. This claim does not seem to me well founded (see *Savage v. Sherman*, 24 *Hun*, 307). The decision in 4 *Redf.* 149

(*In re Leggett*) seems to support the view here [], contended for by the trustees. That decision was made, however, with reference to a state of facts very different from the present. The rents of certain real estate which the executors, as such, had no authority to receive, were in fact collected by them and accounted for with the consent of the parties in interest. Such rents, added to the *corpus* of the personalty, amounted to more than \$100,000, and upon this fund full commissions were allowed by the surrogate to each of the executors. It does not appear upon the statement of the facts that the rents so received were regarded strictly as income in the computation of commissions. Their collection being unauthorized, and the will containing, so far as appears, no provision for the collection or disposition of income, the rents in question might very properly have been treated as substantially an accession to the personalty, and as forming, therefore, a part of the principal of the estate rather than of income collected. In any other view than this, the decision seems opposed to that of the supreme court, general term, of this department in *Savage v. Sherman* (*supra*). Upon the whole, I [] hold that the trustees are entitled to receive such commissions only as would have been grantable to one of their number in case he had been sole trustee.

Estate of Slosson.

Third. The rate at which commissions should be computed is the same as that which is applicable to executors in like cases, and this as regards both ['] income and principal. Whatever may have been the rule on this subject when chapter 115 of the Laws of 1866 was in force, that act having been repealed by the general repealing act of May 10, 1880,* the trustees now stand, with reference to commissions, upon the same footing as executors. *Cram v.* ['] *Cram* (2 *Redf.* 224), and *Ward v. Ford* (4 *Redf.* 34), are cases which seem to countenance the claim of the trustees to a higher rate; but the decision in the former case, which is approvingly referred to in the latter, was based upon the provision of the act of 1866, which, as already noted, has been since repealed. For the purpose of fixing the rate for computation of executors' commissions upon income, such income must be regarded as an addition to the principal, and if ['] commissions have been awarded upon the principal on a basis of five, two and a-half, and one per cent., no greater compensation than at the rate of one per cent. can be allowed upon the income received and paid out (*Lansing v. Lansing*, 45 *Barb.* 182; *Drake v. Price*, 5 *N. Y.* 430; *Betts v. Betts*, 4 *Abb. N. C.* 317, 442; *Meeker v. Crawford*, 5 *Redf.* 463).

* Laws of 1880, chap. 245.

Estate of Bullard.

ESTATE OF JOHN BULLARD, DECEASED.

SURROGATE'S COURT, KINGS COUNTY, NOVEMBER,
1883.

§ 1319.

When appeal from a decree of the surrogate fixing the sum to the income on which a legatee was entitled does not stay the execution of the decree, so far as it directed the payment of the income for the first year.

Where a surrogate made a decree adjudging that one J. E. B. was entitled to the income, on a certain sum conceded to be in the hands of executors in trust for her benefit during her life, and she claiming to be entitled to the income on a much larger sum appealed from the decree, but in her notice of appeal expressly excepted therefrom "so much and such parts of said judgment or decree as adjudges and decrees that said J. E. B. is entitled to interest on her life legacy from the death of said J. B., and at the rate of six per cent. per annum for the first year,"—*Held*, that the appeal did not stay the execution of the judgment so far as it related to the payment of the interest to J. E. B., and the executors should pay the interest on her trust fund as fixed by the decree.

(Decided November 27, 1883.)

Application by executors for the instruction and direction of the court as to the effect of an appeal.

The facts are stated in the opinion.

Charles J. Lowry, for Mrs. Jane E. Bullard.

BERGEN, Surrogate.—This is an application of the executors for instruction and direction of this court as to the effect of the appeal taken by the said Jane E. Bullard from the decree in the above entitled matter

Estate of Bullard.

in this respect, viz. : Whether the said executors should forthwith pay to the said Jane E. Bullard the interest on her trust fund for the first year after testator's death, as fixed by said decree, or whether that portion of said decree which provides for and authorizes such payment is stayed pending such appeal? It is conceded that the executors have in their hands the sum of \$147,909.95, which they hold in trust for the benefit of Jane E. Bullard during her life, and that a decree of this court has been made establishing that sum to be the amount she is entitled to have invested for her benefit.

Mrs. Bullard claims that she is entitled to the income of a much larger amount by reason of several lapsed legacies, and appeals to the general term of the supreme court from the decree or judgment of the surrogate, but in her notice of appeal, she excepts therefrom as follows : " Except from so much and such parts of said judgment or decree as adjudges and decrees that said Jane E. Bullard is entitled to interest on her life legacy, from the death of said John Bullard, and at the rate of six per cent. per annum for the first year."

In any event she will be entitled to receive the income of an amount equal to or greater than the amount already decreed for her benefit, and her notice of appeal having expressly excepted that portion of the decree directing the payment to her of the interest for the first year from the testator's death upon the above sum brings it within the exception embraced in section 1310* of the Code of Civil Procedure, which does not stay the execution of the judgment so far as it relates to the payment of the interest to Mrs. Bullard.

* The provisions of this section are rendered applicable to appeals from a judgment or decree of the surrogate's court by section 2584 of the Code of Civil Procedure.

Danaher v. City of Brooklyn.

I am, therefore, of the opinion that the executors should further pay to Mrs. Bullard the interest on her trust fund as fixed by the decree.

DANAHER, AS ADMINISTRATOR, &C., v. THE CITY
OF BROOKLYN.

SUPREME COURT, SECOND DEPARTMENT, KINGS
COUNTY, SPECIAL TERM, DECEMBER, 1883.

§§ 446, 484, 488.

Action for causing death.—Two causes of action for damages for causing death cannot be united in the same complaint.

Where one J. D. brought an action as administrator of one C. M. D., deceased, and as administrator of one T. J. D., deceased, to recover on two causes of action, one for damages for causing of the death of C. M. D. and the other for damages for causing the death of T. J. D., and in each case the complaint alleged that the death resulted from the same act of negligence on the part of the defendant, and that the deceased was a minor son of the plaintiff and the plaintiff was his only heir and next of kin,—*Held*, that the two causes of action could not be united, and that, not because of the character of the causes of action, but because J. D. as administrator of C. M. D., deceased, and J. D. as administrator of T. J. D., deceased, were in law different persons.

(Decided December, 1883.)

Demurrer to complaint.

The plaintiff, John Danaher, sued as administrator, &c. of Charles M. Danaher, deceased, and also as administrator, &c., of Thomas P. Danaher, deceased, and set out two causes of action in his complaint.

For a first cause of action the complaint alleged :

“That the defendant is a municipal corporation, duly organized and existing under and by virtue of the laws of the State of New York.

Danaher v. City of Brooklyn.

“That among other things, said defendant is charged by law and its charter, with the duty of the care, custody, digging, constructing and repairing public wells and pumps within its corporate limits; to prohibit nuisances therein, and to do all things necessary and proper for good government and for the preservation of public health within its said limits; that it accepted said charter imposing said duty and undertook the performance thereof prior to 1873.

“That a certain street in the city of Brooklyn, defendant, known as De Kalb avenue, is a public highway in said city, and is much used and traveled by the citizens thereof and others, on the south side of which said street or avenue, between Tompkins avenue and Throop avenues in said city, and in front of premises now or lately known as street number 876 De Kalb avenue, there was and stood a public well, or pump, whereby water for the use, benefit and consumption of the citizens of said city of Brooklyn and others was furnished by said city, defendant, and which said public well and pump was placed there by said city of Brooklyn, defendant, for drinking and other uses and purposes, of its waters by its said citizens and others, and had so remained and was used as a public well and pump as aforesaid for many years last past.

“That in and during the year 1882, and prior to the first day of September thereof, the said city of Brooklyn, defendant, unmindful of its duty in the premises, negligently and wrongfully allowed the water in said public well or pump hereinbefore mentioned and described, to become and be stagnant, impure, poisonous, unclean and dangerous to human life and health, of all of which said city of Brooklyn, defendant, had due and timely notice and knowledge, and after such notice and knowledge, willfully and wrongfully neglected and refused to clean and repair said well or pump, or have

Danaher v. City of Brooklyn.

it abated as a nuisance or give public notice of its condition.

"That in and during the months of July and August, 1882, one Charles M. Danaher, a citizen and inhabitant of Brooklyn, defendant, without knowledge on his part of the dangerous, impure and unhealthy condition of the water of said pump, hereinbefore mentioned and described, and, without notice and without negligence on his part, lawfully drank of the same, by reason whereof the said Charles M. Danaher became sick, and on the 26th day of August, 1882, at the city of Brooklyn, died.

"That said Charles M. Danaher left him surviving no widow and no child or descendant, and that his only next of kin is the plaintiff herein, who is the father of said Charles M. Danaher, and who has been deprived of the assistance and services of the said Charles M. Danaher, by his said death, and has been otherwise injured by his sickness and death as aforesaid, to his damage five thousand dollars."

It also averred the appointment of the plaintiff as administrator of the goods, chattels and credits of said Charles M. Danaher, and that he had before the commencement of this action presented his claim upon which this action is founded to the chief fiscal officer of the defendant, who had wholly neglected and refused to pay the same.

The second cause of action was to recover \$5,000 damages for the death of the plaintiff's son Thomas P. Danaher, caused in the same manner as that of Charles M. Danaher. The allegations setting it forth are substantially the same as those which set out the first cause of action. As in the case of Charles M. Danaher, the plaintiff was the only heir and next of kin of Thomas P. Danaher.

The defendant demurred to the complaint on the grounds that:

(1.) That there is a misjoinder of parties plaintiff in

Danaher v. City of Brooklyn.

that John Danaher sues in the capacity of administrator, &c., of the estate of Charles M. Danaher, deceased, and also in the capacity of administrator, &c., of the estate of Thomas P. Danaher, deceased. (2) That two causes of action have been improperly united in that a cause of action founded upon the alleged negligence of the defendant, to recover damages resulting from the death of Charles M. Danaher has been joined with a cause of action founded upon the alleged negligence of the defendant, to recover damages resulting from the death of Thomas P. Danaher." And (3) "That the complaint does not state facts sufficient to constitute a cause of action.

John A. Taylor, corporation counsel, for the demurrer.

F. M. Danaher, opposed.

CULLEN, J.—I don't think these two causes of action can be united, and in my opinion the difficulty is not with the character of the cause of action but with the plaintiff.—I think Danaher, administrator of Charles M. Danaher, deceased, and Danaher, as administrator of Thomas J. Danaher, deceased, are in law different persons. A judgment in an action in which the plaintiff in one capacity is a party would not be conclusive in an action for or against him in the other capacity. The case of a surviving partner is not in point. By the death of his copartner, the survivor does not take title in any new or representative character. On the contrary, his personal obligations may be set off against the partnership demand. But the reverse is the rule with personal representatives.

Farther as to the question here involved, authorities are against the plaintiff. *Sucar v. N. Y. Central R. R. Co.*, 21 *Barb.* 245.

Davies v. Mayor, &c. of N. Y.

Judgment for defendant on demurrer, with leave to plaintiff to serve an amended complaint on payment of costs.

DAVIES, APPELLANT v. THE MAYOR, &c. OF THE
CITY OF NEW YORK.

COURT OF APPEALS, JUNE, 1883.

§ 738.

Municipal corporation—When bound by unauthorized acts of private individual or officer—Offer of judgment—When accepted is bar to new action for claim or part of claim set out in complaint.

Where the supervisors of New York county hired certain premises under a written lease for the term of one year from May 1, 1872, for the use of the recorder and he entered into possession and continued to occupy them without further lease or agreement until about July 1, 1877, when he removed therefrom, but the key of the premises was not delivered to the landlord, and he did not resume possession until after May 1, 1878, and the common council of the city and county of New York which succeeded to the powers of the supervisors, in December, 1876 passed a resolution setting apart certain rooms in the city building for the use of the recorder, and directing that notice be given and provision be made accordingly, but the rooms were not ready for occupancy until about August 1, 1877,—*Held*, in an action brought against the city by the owner of the premises so occupied by the recorder to recover for their use and occupation for the year, commencing May 1, 1877, at the rate stipulated in the lease, that it was the duty of the city, if it desired to terminate the lease, to surrender possession [¹, ⁴]; that the plaintiff had a right to assume in the absence of notice that the recorder's remaining in possession after May 1, 1877, was by the authority or acquiescence of the defendant and to treat it as a renewal of the lease for another year.[²]

The general rule that a municipal corporation is not bound by the unauthorized acts of an individual, whether an officer of the corporation or a mere private person, is unquestionable, but the corporation may so deal with third persons as to justify them in assuming

Davies v. Mayor, &c. of N. Y.

the existence of an authority in another which in fact has never been given.^[2]

Where a general offer of judgment was made in an action and accepted and judgment entered thereon, the party accepting it is thereby concluded from bringing a new action for any part of the claim embraced in the complaint and which might have been litigated in the action.^[1]

(Decided October 2, 1883.)

Appeal from judgment of the general term of the New York superior court affirming judgment of special term dismissing the complaint.

On the 13th day of May, 1872, the board of supervisors of the county of New York, by resolution, authorized the hiring of rooms in premises belonging to plaintiff for the use of the recorder as his chambers for the term of one year from May 1, 1872, at the yearly rent of \$2,000, payable in quarterly installments of \$500 each, on the first days of August, November, February and May. The recorder entered into possession and continued actually to occupy the premises, without further authority, until July, 1877.

The city and county of New York having been united in 1874 and the board of aldermen invested with the power of supervisors (Laws of 1874, chap. 304), it on December 28, 1876 assigned rooms in a city building to the recorder to be used as his chambers, but as the rooms were not then ready for occupation, he did not remove thereto until July, 1877.

The rent of the plaintiff's premises was paid at the rate named in 1872, on the usual quarter days to and including November 1, 1876.

In December, 1877, the plaintiff brought an action against the defendant herein, to recover quarterly installments of \$500 each due on the first days of February, May, August and November, 1877. On the trial of that action the complaint was dismissed, but upon appeal the court of appeals determined that the city was liable, as a tenant holding over, for the rental

Davies v. Mayor, &c. of N. Y.

of the year ending May 1, 1877, and a new trial was directed. The defendant thereafter served an offer "to allow judgment to be entered against them for the principal sum of \$1,000 with interest on \$500 thereof from February 1, 1877, and interest on \$500 from May 1, 1877, besides the costs and disbursements accrued and incurred in this action to the date" thereof. This offer the plaintiff accepted and entered judgment accordingly.

Thereafter, in March, 1881, the plaintiff brought this action to recover four quarterly installments of said rent of \$500 each, claimed to have become payable on the first days of August and November, 1877, and February and May, 1878, respectively.

On a trial at special term the court found for the defendant, and dismissed the complaint. The general term affirmed that judgment and this appeal was thereupon taken.

Edmund Coffin, Jr., for appellant.

If the prior adjudication is not a bar to the plaintiff's claim for the six months, between May 1 and November 1, 1877, the plaintiff is entitled to recover as claimed in his complaint. . . . *Guest v. City of Brooklyn*, 79 *N. Y.* 624; *Ackley v. Westervelt*, 86 *Id.* 448. . . . Resolutions of the common council are not public notice of which all are bound to know. *Porter v. Waring*, 69 *N. Y.* 250. A tenant after the expiration of his lease can be relieved from a continuing liability for the conventional rent only by a new agreement or the surrender of the premises. The affirmative duty is on the tenant to quit and vacate. No duty is on the landlord to see that he gets a good and sufficient lease. . . . All he was obliged to do after that was to look at the physical condition of his premises and await the tenant's surrender. The corporation cannot refuse or neglect to surrender to the landlord and then

Davies v. Mayor, &c. of N. Y.

fall back upon any charter or corporation immunity from liability. The obligation to pay does not depend on contract but arises from the trespass. *Schuyler v. Smith*, 54 *N. Y.* 309; *Witt v. Mayor*, 5 *Robt.* 248; *S. C.*, 6 *Id.* 441.

David J. Dean (*George P. Andrews*, corporation counsel), for the respondent.

The act of the recorder in continuing in possession after the passage of the resolution assigning to him the rooms in a building belonging to the city is not sufficient to create a liability against the city. The retention of the premises was then unauthorized by the assent or acquiescence of the city and their dissent from such occupation is evinced by their resolution. That the corporation cannot thus be bound by the unauthorized act of a public official is substantially held by the court of appeals in the former discussion (*Davies v. Mayor*, 83 *N. Y.* 207), and the doctrine is well established in the following cases: *McDonald v. Mayor*, 68 *N. Y.* 23; affirming *S. C.*, 4 *N. Y. S. C. (T. & C.)* 177; 1 *Hun*, 719; *Brady v. Mayor*, 2 *Bosw.* 183; *S. C.*, 20 *N. Y.* 312; *Donovan v. Mayor*, 33 *Id.* 291; *Hodges v. Buffalo*, 2 *Denio*, 112; *Bonesteel v. Mayor*, 22 *Id.* 162; *Dillon on Municipal Corporations*, §§ 272-381; *Supervisors v. Ellis*, 59 *N. Y.* 620.

ANDREWS, J.—The tenancy of the premises for the rent of which this action is brought was initiated under a written lease from the plaintiff to the board of supervisors for the term of one year, from May 1, 1872. They were hired for the use of the recorder as his chambers, and he entered into possession and continued to occupy them until about July 1, 1877, when he removed to a city building in Chambers street. The key, however, of the plaintiff's premises was not delivered to him, nor did the plaintiff resume posses-

Davies v. Mayor, &c. of N. Y.

sion until after May 1, 1878. By the written lease the stipulated rent was \$2,000 a year, payable quarterly. This action is brought to recover rent at the rate stipulated in the lease for the year commencing May 1, 1877.

It is urged as a complete defense that the holding over by the recorder after May 1, 1877, was without the authority of the city, and did not operate as a renewal of the lease. We think this defense cannot be sustained. That the tenancy originated under a lawful hiring, and that the lease was renewed from year to year by the holding over of the recorder until May 1, 1877, was determined in the prior action between these parties (83 *N. Y.* 207). It is claimed that the holding over by the recorder after that time was unauthorized by reason of the resolution of the common council of December 26, 1876 assigning rooms in the city building for his use. But the resolution of December 26, 1876, did not contemplate an immediate occupation of the new chambers by the recorder. They were not ready for occupancy and were not so ready until about August 1, 1877. The resolution, setting apart certain rooms in the city building for the use of the recorder, directs the commissioner of public works "to give notice and make provision accordingly." There was nothing in the action of the common council to indicate that it designed to terminate the occupancy of the plaintiff's premises before the new chambers were ready. It was the duty of the city, if it desired to terminate the lease, to surrender possession.

['] This it did not do. It (or its predecessor in interest) put the recorder in possession. It continued him in possession for several years after the expiration of the original lease. The plaintiff had ['] a right to assume in the absence of notice, that his remaining in possession after May 1, 1877, was a renewal of the lease for another year.

Davies v. Mayor, &c. of N. Y.

The general rule is unquestionable that a municipal corporation is not bound by the unauthorized act of an individual, whether an officer of the corporation ['] or a mere private person. But the corporation may so deal with third persons as to justify them in assuming the existence of an authority in another which, in fact, has never been given. The city in this case, as has been said, put the recorder in possession, allowed him to continue in possession for years, using the plaintiff's premises as a court room, and this possession continued after May 1, 1877, in the same way as for the years before. Under such circumstances an affirmative duty rested on the city to surrender ['] the possession, or at least to notify the plaintiff before a new year was entered upon, that the tenancy would not continue in order to terminate the lease.

But we are of the opinion that the judgment in the former action entered upon the offer of the defendant, is a bar to the recovery of rent for the two quarters embraced in the complaint in that action. This conclusion does not rest upon the ground that the question of the right to recover rent for the two quarters ending November 1, 1876, was adjudicated adversely to the plaintiff in that action. It clearly was not; but it rests upon the ground that a general offer of judgment accepted, upon which judgment has been entered, ['] concludes the party accepting it from bringing a new action for any part of the claim embraced in the complaint, and which might have been litigated in the action.* The offer under the Code is made to save

* The general term of the superior court, in making the determination from which this appeal was taken, took the same view of this question, and in its opinion (per RUSSELL, J., SEDGWICK, Ch. J., and FREEDMAN, J., concurring), filed April 3, 1882, considers it at length. The portion of the opinion treating of this subject is as follows :

"But there is one logical result of the conclusion to which we

Davies v. Mayor, &c. of N. Y.

litigation. The party to whom it is made may accept or reject it. If he accepts it, and may afterwards bring a new action, and sustain it by proof that the whole

have come, with reference to the effect of the judgment, entered upon the offer, which makes conclusively against a part of the claim included in the plaintiff's present action; which is, that the claim for rent falling due August 1, and November 1, 1877, having been made a part of the plaintiff's cause of action in the former suit, compromised by the offer, became merged in the judgment entered therein, so that the plaintiff's action in this case, so far as that portion of his claim is concerned, is barred by the judgment.

"The defendants made a general offer to compromise the claim sued on. There was no proof, nor any stipulation between the parties by which it was agreed that any part of the cause or causes of action should be held to be withdrawn from the contemplation of the parties in making the compromise, and therefore the case does not come within those authorities cited by the counsel for the appellant in which a party was permitted to bring a new action for a severable cause of action sued on, or alleged by way of counterclaim in a former action, upon its being made to appear in court, either by parol evidence or by stipulations, that such cause of action was withdrawn, and not litigated in the trial of the former action (*Kerby v. Daly*, 63 *N. Y.* 659; *Knox v. Hexter*, 71 *Id.* 461).

"There can be little doubt, and these authorities concede, that in the absence of proof of such withdrawal, a general verdict or judgment would be a bar to a further suit on any cause of action or counterclaim pleaded in the action in which judgment was had (6 *Wait Actions and Defences*, 776, title 'Former Adjudication'; *Hopf v. Myers*, 42 *Burb.* 270; *Pinney v. Barnes*, 17 *Conn.* 420; *Dodds v. Blackstock*, 1 *Pittsburgh (Pa.)* 46; *Bagot v. Williams*, 3 *Barn. & Cres.* 235).

"If in the former action between the parties here, a trial had been had upon the pleadings as they stood, a general verdict had been rendered, and judgment entered thereupon, such a verdict would have been a bar to any action for a claim included in the complaint in that action. The plaintiff's only remedy in case the verdict had been for the sum offered in compromise here, would have been to move to set aside the verdict for inadequacy, and to appeal (*Philips v. Berick*, 16 *Johns.* 136). SPENCER, J.—'Where, for instance, a demand of a party is submitted to a jury, and they see fit to disallow it, either for want of sufficient proof or for any other cause, a verdict and judgment thereon is conclusive, and the same demand is barred for ever.'

Davies v. Mayor, &c. of N. Y.

claim originally made was recoverable, or that the amount offered was due on one of several causes of action embraced in the original action, it would or

"So long as the judgment stood of record it would have been *res adjudicata*. A judgment entered upon an offer of compromise certainly cannot put a plaintiff in better position than he would have been with a verdict for the same amount, in the absence of any proof that a portion of the claim embraced in the complaint was withdrawn and not litigated (see *Smith v. Jones*, 15 *Johns.* 229; *Farrington v. Smith*, *Id.* 432; *Miller v. Covert*, 1 *Wend.* 487; *Guernsey v. Carver*, 8 *Id.* 492; *Stevens v. Lockwood*, 18 *Id.* 645).

"In *Dodds v. Blackstock* (1 *Pittsburgh [Pa.]*, 46), it was held, that, 'when a defendant offers to confess judgment for part of the plaintiff's claim, and the plaintiff enters judgment for the amount so tendered, and proceeds to execution, he cannot recover the balance of the claim.' In that case the plaintiff filed a bill of particulars and an affidavit of claim for the sum of \$315. The defendants offered to confess a judgment for \$206.12, which he admitted to be due, and filed an affidavit of defense as to the residue. Judgment was entered for the sum of \$206.12, 'without prejudice to a recovery for the balance.' The case went to trial on a special plea setting forth the above facts. A verdict was rendered for the plaintiff under the direction of the court, who reserved the question whether the facts appearing of record constituted a bar to the recovery of the balance of the plaintiff's claim. It was held that it did, and the decision was affirmed in the supreme court, but unreported.

"In *Brazier v. Banning*, 8 *Harris*, 345, an action of covenant for the recovery of ground rent, and an affidavit of defense was made to part of the claim; judgment was taken for the part not disputed, and payment was voluntarily made. It was held that the plaintiff was precluded from recovering more; that the judgment taken was a bar to any further proceeding for the cause of action.

"But for section 511 of Code, which permits the entry of an interlocutory judgment for an amount admitted to be due, our practise would be the same.

"In *Bagot v. Williams* (3 *Barn. & Cres.* 235), the head note correctly states the case: *Assumpsit* for money had and received. Plea, a judgment recovered for want of a plea, £4,000. In an inferior court, in Wales, for the same cause of action. Replication, that the causes of action were not the same, and issue joined thereon. At the trial it appeared that the defendant had received, on account of the plaintiff, and as his steward, different sums of money at different

Davies v. Mayor, &c. of N. Y.

might destroy the only consideration upon which the other party acted in making the offer. *Non constat* that the offer would have been made except upon the

times, and that on the investigation of the accounts the plaintiff found that there was due to him a much larger sum than that for which he had declared in the inferior court, but that he had proceeded for the smaller sum under the belief that the defendant had no available property beyond that amount. Defendant in that action suffered judgment by default, and plaintiff verified for £3,400. *Held*, that all the sums which the plaintiff knew the defendant had received at the time when he commenced the action in the inferior court were to be considered as causes of action in respect of which he had declared and recovered judgment.

"BAILEY, J., in the course of his opinion, says: 'In this case, Lord Bagot, at the time the first action was commenced, had a demand upon the defendant, not for one specific sum of money, but for different sums of money received by the defendant, on his account, from different persons, and at different times. His agent knew he had claims in respect of all the sums now claimed, except forty-six pounds, and having that knowledge, he formed an opinion that three thousand four hundred pounds was the whole sum which Lord Bagot ought to claim, and if he acted upon that opinion, it is much the same thing as if a plaintiff in a cause at *nisi prius*, having a claim of sixty pounds, consisting of three sums of twenty pounds which became due to him at different times, consented to take a verdict for forty pounds. If the jury in such case, at the suggestion of the plaintiff, reduced the verdict to forty pounds, he would be bound by it, and could not afterwards bring an action for the other twenty pounds. It seems to me that he is equally bound by his own act in this case as he would have been by the verdict of a jury in the other, and that, having chosen to abandon this case once, he has done it for ever.'

"In *Pinney v. Baines* (1 Conn. 420), a suit had been brought upon a removed executor's bond for malfeasance, and a recovery had. Among the breaches alleged in that suit were, that the defendant had neglected, and refused upon demand made therefor, to pay over to his successor the moneys in his hand belonging to the estate. On *scire facias* afterwards brought on this judgment to recover moneys which were in the hands of such executor to pay certain legacies, it was held that the former suit was a bar.

"The authorities from which I have quoted go much further than it is necessary to go in this case, except those in Pennsylvania, which

Davies v. Mayor, &c. of N. Y.

view that its acceptance would extinguish the entire claim. The offer in question was to permit judgment to be taken for \$1,000, with interest on \$500 from February 1, 1877, and on \$500 from May 1, 1877. We can very easily see that the defendant intended to permit judgment for the two quarters rent prior to May 1, 1877, and not for the rent of the two quarters commencing May 1, 1877, which was also embraced in the action. The plaintiff was at liberty to reject the offer. The acceptance and judgment merged the whole claim. Upon the evidence as now presented, we think the plaintiff is entitled to recover rent for the six months ending April 30, 1878.

The judgment should be reversed, and a new trial ordered.

All concur.

are the only ones exactly in point that have come within my observation.

"The law as to payment, accord and satisfaction, and releases, by analogy throw some light upon the same question; and there can be no doubt that if the plaintiff, making a claim such as he made in the former action, which was disputed by the defendant, had received the sum for which he entered judgment on the offer of compromise, either in payment or as an accord and satisfaction, or certainly for a release of such claim, he could not again assert a right of recovery upon it (*Cooper v. Parker*, 14 *Common Bench Rep.* 118; Same case on appeal, 15 *Com. Bench Rep.* 822).

"I am therefore of opinion that the plaintiff's claim in this action to recover for the rent which, according to his theory, fell due August 1 and November 1, 1877, was barred by the judgment entered on the offer of compromise in the former action."

Hull v. Allen.

HULL v. ALLEN.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM,
DECEMBER, 1883.

§ 1013.

When reference not ordered in action by attorney for professional services.

Where in an action by an attorney to recover for professional services, the answer admitted the services, averred that the charges were exorbitant, that they had been rendered to defendant solely as executor, that the surrogate had made an award therefor, and that the plaintiff when employed had agreed to perform the services for the amount of such award as should be made,—*Held*, that the question concerning the agreement between the parties materially affected the right of recovery, and should be submitted to a jury, unless the items of the plaintiff's account are so numerous and of such a character as to render it unlikely that a jury could carry them in mind with the accuracy required for intelligent consideration and a just conclusion.

Where, in such action, the labors of the attorney were germane to one subject of litigation and rendered under one retainer, and although the several acts of service were numerous, but one sum was affixed to all the items in a bill of particulars served by the plaintiff, and there seemed to be no issue made upon the rendition of the services but only upon their value, being the amount in gross demanded by the plaintiff,—*Held*, that the trial would not require the examination of a long account, so as to call for a compulsory reference.

(Decided December, 1883.)

Motion for a reference in an action by an attorney for professional services on the ground that the trial would require the examination of a long account.

This plaintiff, who is a member of the New York bar, brought this action to recover \$13,214.87, balance claimed to be due for services rendered by him for the

Hull v. Allen.

defendant during the nine years prior to the spring of 1883, in the matter of the probate of the last will and testament of John Hancock, deceased, of which the defendant was executor.

The answer admitted the performance of the services, but alleged that the charges therefor were exorbitant, and set up that the plaintiff had agreed, at the time he was employed by defendant, to accept such amount as might be awarded by the surrogate in payment for his services; that the surrogate had made an award. The plaintiff served a bill of particulars of his claim, setting forth the several acts of service performed by him, which took up twenty-eight pages of legal cap.

Thereafter he made this motion.

Amos G. Hull (Childs & Hull, attorneys), for the motion.

Andrew Lemon & Joseph Fettrich, opposed.

BEACH, J.—There is a question concerning the agreement between the parties for the plaintiff's professional services materially affecting the right of recovery. This should be submitted to a jury unless the items of plaintiff's account are so numerous and of such a character as to render it unlikely that a jury could carry them in mind with the accuracy required for intelligent consideration and a just conclusion.

The labors of the attorney were germane to one subject of litigation and rendered under one retainer. Although his specific acts during a persistent and lengthy contention were numerous, still it by no means follows that each and every one must be shown with its value. This is not indicated by the bill of particulars, where but one sum is fixed to all the items. There seems to be no issue made upon the rendition of the

Stebbins v. Cowles.

services, but only upon their value being the amount in gross demanded by the plaintiff.

The trial in my opinion will not require the examination of a long account so as to call for a compulsory reference. *Dittenhoefer v. Lewis*, 5 *Daly*, 72 ; *Felt v. Tiffany*, 11 *Hun*, 62, and cases cited.

Motion denied.

STEBBINS, RESPONDENT, v. COWLES, APPELLANT.

*Supreme Court, Fourth Department ; General Term,
October, 1883.*

§ 1013.

Action by attorney for professional services, when referable.—Supreme court no power to review discretionary orders of county court.

An action by an attorney and counselor at law for services as such, which involves the examination of a long account, is referable. No case has gone so far as to deny the power to refer in such an action; all those in which a reference was refused rest upon circumstances of discretion, or upon the ground that the action did not involve a long account.

Where in an action by an attorney to recover for professional services, the plaintiff moved for a reference on the ground that the action involved a long account, and the defendant on such motion admitted that the items in a bill of particulars served by plaintiff, which were numerous, were correctly stated as to their number, date, and character, but not as to their value, and the motion was therefore decided, and on the trial it appeared that the items of the account were not so fully and distinctly admitted as to preclude the necessity of giving evidence of their nature as well as of their value, and the trial judge took the case from the jury, and ordered a reference,—*Held*, no error; that the facts warranted the conclusion of the court that the trial involved the examination of a long account.

Stebbins v. Cowles.

A discretionary order of a county court cannot be reviewed by the general term of the supreme court upon appeal. The decision of one tribunal resting in discretion cannot be reviewed by another.

Martin v. Windsor Hotel Co. (10 *Hun*, 304); *Felt v. Tiffany* (11 *Id.* 62), distinguished.

Appeal from an order made at a trial term of the Munroe county court, referring the issues in this action for hearing and determination.

The opinion states the facts.

W. Henry Davis, for appellant, cited in support of contention that action should not have been referred : *Martin v. Windsor Hotel Co.*, 10 *Hun*, 304; *Felt v. Tiffany*, 11 *Id.* 62; *Bathgate v. Haskin*, 39 *N. Y.* 533; *Brink v. Republic Fire Ins. Co.*, 2 *N. Y. S. C. (T. & C.)* 550; *Thomas v. Neat*, 6 *Wend.* 503; *Dickinson v. Mitchell*, 10 *Abb. Pr.* 286; *Dittenhoefer v. Lewis*, 5 *Daly*, 72; *Warning v. Chamberlain*, 14 *N. Y. Weekly Dig.* 564.

John W. Stebbins, respondent in person.

SMITH, P. J.—The action is brought to recover for services as an attorney and counselor at law. The complaint contains a single count alleging such services generally, and the bill of particulars furnished by the plaintiff specifies numerous items extending through a period of four years, including services rendered in four separate suits. The answer admitted generally that the plaintiff performed services for the defendant, “during the time, and as stated in the complaint,” but with that exception, denied the complaint and alleged payment, and that the services were performed negligently.

The plaintiff having moved for a reference, the

Stebbins v. Cowles.

defendant admitted that the items of plaintiff's bill of particulars were correctly stated as to their number and date and character of services, but not as to their value, and therefore the motion was denied. Subsequently the cause came on for trial before the county court, and the plaintiff having proceeded in part with his proof and offered evidence as to value, which was objected to by the defendant, the court decided that all the items of the account, their nature and value, must be proved, and ordered a reference. From that order this appeal is taken. We think that the appeal cannot be maintained. The action was one which the county court had power to refer in its discretion. The numerous items of the account were not so fully and distinctly admitted as to preclude the necessity of giving evidence of their nature as well as their value, as seems to have been demonstrated by the partial trial of the cause. The facts warranted the conclusion of the court below, that the trial involved the examination of a long account. The order being discretionary, we cannot review it. The decisions of one tribunal resting in discretion are not reviewable by another (*Ward v. Wiles*, 24 *N. Y.* 635; *Tanner v. Marsh*, 53 *Barb.* 438). That rule does not apply to a review by the general term of this court, of the decision of the special term, they being parts of the same court. But the county court being an independent tribunal, this court cannot interfere with the exercise of its discretionary powers.

The learned counsel for the appellant cites cases in which a reference of an attorney's account has been refused. No case has gone so far as to deny the power to refer in such a case; they all rest upon circumstances of discretion (*Martin v. Windsor Hotel Co.*, 10 *Hun*, 304), or upon the ground that the action did not involve a long account* (*Felt v. Tiffany*, 11 *Id.* 62).

* See *Hull v. Allen*, *ante*, p. 300.

Weed v. Paine.

The appeal should be dismissed, with ten dollars costs, and disbursements.

HARDIN and BARKER, JJ., concurred.

WEED ET AL. v. PAINE ET AL.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
OCTOBER, 1883.

§§ 3253, 3254.

Additional allowances—Not limited to \$2,000 in the aggregate, but to \$2,000 to each side when both parties are successful in an action specified in section 3253 of the Code.—Compensation of guardian ad litem.

The compensation made to a guardian *ad litem* in an equitable action, is not dependent upon the provisions of the Code, providing for extra allowance, or any other similar provision.^[1] The court has inherent and well established authority to award to the guardian such a compensation as appears to be reasonable for the services he in fact performed, to be paid out of the subject matter of the action.^[2] The compensation to a guardian *ad litem* should be considered as independent of and forming no part of the amount mentioned in the Code as the sum which may be awarded as additional allowances.^[3]

While the additional allowances in an action provided for in section 3253 of the Code cannot ordinarily exceed \$2,000, where parties who may be adversely related to the action are each successful and for that reason become entitled to costs, this restraint has no application further than that the allowances should not exceed \$2,000 to the parties on each side of the action.^[3, 4]

In an action for partition, it seems, that where there is a sale of the property each side is entitled to costs, but where there is actual partition the right of both sides to costs is a subject of serious doubt.^[5]

(Decided October 26, 1883.)

Weed v. Paine.

Appeal by all the parties from an order granting additional allowances of costs.

This was an action for the partition of real estate, in which an actual partition was made. The property consisted of sixteen houses and lots in the City of New York, and three in Monroe county, and was appraised by the commissioners appointed to make partition at the sum of \$252,100. An application for an additional allowance was made by each of the attorneys who represented parties to the action, and an order was made and entered, which, omitting the title, etc., was as follows :

"A motion for allowance in addition to costs on final decree in the above-entitled action coming on for hearing on the affidavit of John S. Davenport, Elial F. Hall, Ovide Dupré, Almet F. Jenks and Dwight A. Jones, after hearing John S. Davenport, Esq., of counsel for plaintiffs and their guardian *ad litem*, Elial F. Hall, Esq., of counsel for defendants Ann Amanda Swift, Priscilla C. Drinker and James Drinker, also for the guardian *ad litem* of the infant defendants Annie F. Swift and Naomi C. Swift, and also for the guardian *ad litem* of the infant Phoebe N. Drinker, and also after hearing Almet F. Jenks, Esq., of counsel for the defendants Hanford Smith and Margie V. Smith, his wife, and also Dwight A. Jones, Esq., guardian *ad litem* of the infant defendant Hanford Edsel Smith and Ovide Dupré, of counsel for Naomi C. Paine and Naomi C. Paine as guardian *ad litem*, and the court being of the opinion that it has no power under the Code of Civil Procedure to allow more than \$2,000, in addition to costs, in the aggregate, to all the parties, and the court being further of the opinion that it has no power to grant allowances by way of compensation to the guardians *ad litem* in this case additional to or

Weed v. Paine.

apart from said sum of \$2,000, and upon the ground of such lack of power as aforesaid, it is

“Ordered, that the aggregate of the allowances to all parties in this action be limited to \$2,000, which said sum, and no more, on the ground aforesaid, is allowed to all parties; and it is

“Ordered, that the same be apportioned among the said parties as follows: To the plaintiffs and their guardians *ad litem* \$800, to the defendants Ann Amanda Swift individually and as guardian *ad litem*, Priscilla C. Drinker and John M. Drinker, guardian *ad litem*, or to their attorney, Elial F. Hall, Esq., \$500; to the defendant Naomi C. Paine, individually, and as trustee under the will of Hanford Smith, deceased, and as guardian *ad litem*, \$400; to the defendant Hanford Smith the sum of \$200; and to Dwight A. Jones, Esq., guardian *ad litem*, \$100.”

John S. Davenport (*Davenport & Leeds*, attorneys), for plaintiffs, and their guardian *ad litem*.

Elial F. Hall, for defendants, Ann Amanda Swift and others, and their guardians *ad litem*.

Cited in support of contention that the court had power to award allowances exceeding in the aggregate \$2,000: Code of Civil Procedure, §§ 3253, 3254; Throop's Annotated Code, note to section 3254; Laws of 1876, chap. 431; *Noyes v. Children's Aid Soc.*, 3 *Abb. N. C.* 36; *Bockes v. Hathorn*, 17 *Hun*, 87; *Betts v. Betts*, 4 *Abb. N. C.* 433; that the court had power to grant allowances outside of, and independently of, the limitation of \$2,000 in section 3254 of the Code: *McCue v. O'Hara*, 5 *Redf.* 336; General Rules of Practice, 50, 51; Rules of Court of Chancery (1822, 1837, 1844) 143, 147; that the court has inherent power to make such allowances: *Downing v. Marshall*, 37 *N. Y.* 380; *Story's Equity Jurisprudence*, § 1352;

Weed v. Paine.

Wetmore v. Parker, 52 N. Y. 450; Clark v. Binger, 75 Id. 344; *In re* Attorney-Genl. v. North Am. Life Ins. Co., 91 Id. 61; Ward v. James, 10 Hun, 526; that the order appealed from was appealable: Hanover Ins. Co. v. Tomlinson, 58 N. Y. 215; Tilton v. Beecher, 59 Id. 176.

Almet F. Jenks (Ward & Jenks, attorneys), for defendants, Hanford and Magie V. Smith.

Dwight A. Jones, guardian *ad litem* in person.

Ovide Dupré, for defendant, Naomi C. Paine and others.

DANIELS, J.—The action was for the partition of real estate owned by Hanford Smith in his lifetime, and upon its final determination an additional allowance of costs to the extent of \$2,000 was made and distributed between the parties to the action, including the compensation to the guardian *ad litem*. The court declined to increase the aggregate amount of the allowance, upon the supposition that it could in no event exceed the sum of \$2,000, and that the guardians' compensation should be included within that sum.

The compensation made to a guardian *ad litem* in equitable actions was not, however, dependent upon this,* or any similar provision of the Code. For ['] before its enactment it was the practice of the court of chancery to compensate the guardian for the services performed by him in the protection of the infant's interests, by allowing him to recover costs not exceeding the taxable items prescribed for the services performed. *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85, 87; *Gott v. Cook*, 7 Id. 523, 544.

And under this inherent and well established

* Sections 3253, 3254.

Weed v. Paine.

authority of the court, the rule has been prescribed and followed, of awarding to the guardian, to be ['] paid out of the subject matter of the action, such a compensation as appears to be reasonable for the services he in fact performed. And rule 50 of the present rules of all the courts of record of the State in express language embodies the continued application of the same principle. The authority has not been derived from, and is not included within the provisions of the Code relating to additional allowances, and for that reason the compensation to the guardian *ad litem* should be considered as independent of, and forming no part of the amount mentioned in the Code.

By the language of section 3253 of the Code, the most general authority is given to the courts to make additional allowances by way of costs in actions for the partition of real property. And this general language is subjected to no other restriction than that contained in the succeeding section, and that restriction is that all the sums awarded to the plaintiff or to a party, or two or more parties, on the same side, cannot exceed in the aggregate \$2,000. The ordinary effect of this section would be to limit allowances in an ['] action to this sum of \$2,000. For the cases are not common in which each of the adverse parties to the action may become entitled to costs, and when they are not, the allowance must necessarily be confined to the successful party. But when parties who may be adversely related to the action are each successful, and for that reason become entitled to costs, there this restraint can have no application. For it has been expressly confined to the party or parties on the same side in the action, and by that phraseology it must have been intended to include only the party or parties sustaining the same relation to the controversy either as plaintiffs or defendants. The language cannot consistently be construed so as to give it any greater legal

Weed v. Paine.

significance. When therefore the parties on each side of the action may prove to be successful, and on that account each entitled to recover costs separately, this provision does not stand in the way of the court in the exercise of the preceding general authority in its power over this subject of allowances, further than they ['] shall not exceed \$2,000 to the parties on each side of the action. It does not, in other words, prevent the court from exercising the same authority in behalf of the parties on each side of the litigation, so that an allowance may now be made in a proper case to the plaintiff or plaintiffs in an action, and also to the defendant or defendants, provided that they shall not exceed \$2,000 on a side, or \$4,000 in the aggregate.

In determining this point it becomes unnecessary to recur to the provisions contained in the preceding Code. For the language which has been now employed to express the legislative intention is reasonably plain and free from ambiguity, and it supports this and no other fair construction.

Whether an action for the partition of real estate may be included within this authority to the extent of permitting an allowance to the parties on each side is not a matter now requiring to be determined. If ['] actual partition of the property is made, that may be the subject of serious doubt (Code, § 1559). While if the sale of the property is made, then the right would seem to be reasonably free from doubt (Code, § 1579).

But as the right to the allowances was not considered when the order was made, but only the extent of the authority of the court over the subject, this doubt is not required to be solved on this occasion. All that can now be determined is that the provisions relating to allowances do not limit them to the sum of \$2,000 when they may be made to one or more

Bundick v. Hale.

plaintiffs, and also one or more defendants in the action.

The order should be reversed, but without costs.

DAVIS, P. J., and BRADY, J., concurred.

BUNDICK AND ANOTHER, RESPONDENTS, v. HALE,
APPELLANT.

SUPREME COURT, THIRD DEPARTMENT; GENERAL
TERM, JULY, 1883.

§§ 2863, subd. 4, 3228, subd. 3.

Costs—When plaintiff not entitled in action in court of record in which he did not recover \$50—Payments on account of a debt are in extinguishment of it.

Where in an action in the supreme court it appeared that the plaintiff's claim was for goods sold and cash advanced \$473.98, and that \$393.90 had been paid on account, and the plaintiff recovered a judgment for less than \$50,—*Held*, that the action was one of which a justice of the peace would have had jurisdiction, [1, 2] and therefore the defendant was entitled to costs; that the payments operated in extinguishment of plaintiff's demand *pro tanto* and that only the balance of the account between the parties could be taken into consideration in determining the jurisdiction of a justice.[3, 4]* Payments go in extinguishment of an account.[1]

Where in such a case, the referee, before whom the cause was tried, awarded costs to the plaintiff,—*Held*, that he was in error; that he had no right to pass upon the right to costs it being declared by statute and absolute upon the facts found.[10]

* See Steele v. MacDonald, *ante*, p. 227.

Bundick v. Hale.

Crim v. Cronkhite (15 *How. Pr.* 250); [³] *Matteson v. Bloomfield* (10 *Wend.* 555); [²] *Mills v. N. Y. C. P.* (10 *Id.* 557 note); [⁴] *Lamoure v. Caryl*, (4 *Denio*, 370); [⁵, ⁶] *Fuller v. Conde* (46 *N. Y.* 89). [⁶] followed.

Appeal from an order of the special term denying a motion made by defendant for a new taxation of costs.

The plaintiffs, who were copartners, brought this action to recover \$65, a balance claimed to be due on an account for merchandise sold and delivered to the defendant, and cash loaned him. The defense was payment, and a counter-claim of \$11.40, an alleged overpayment.

A referee to hear and determine was appointed who found as matter of fact: "That during the time that the said firm (plaintiffs) were doing business . . . beginning about February 10, 1874, and continuing to December 19, 1877, the said firm and defendant had mutual dealings and accounts, which upon the part of said firm consisted of goods, wares and merchandise, sold and delivered to or for defendant, and for cash advanced to him; and upon the part of defendant consists of lumber, hides and produce sold by him to said firm, and cash paid to said firm to apply on said account they had against him, which amounted at the last mentioned date in the aggregate to the sum of \$742.41." Here the finding set out the items of the account which are stated in the opinion, after which it continued, "that the money loaned and advanced by said firm to the defendant was treated by said firm as a matter of book account and being entered in said account from time to time as the various loans occurred."

The referee, as a conclusion of law, found that the plaintiff was entitled to judgment for \$10.25, and interest, "amounting in all to \$12.02, with costs."

Bundick v. Hale.

The plaintiffs and defendant each presented a bill of costs to the clerk for taxation, and each objected to the adjustment of his opponent's bill of costs. The clerk taxed the plaintiffs' bill and disallowed the one presented by the defendant, whereupon the defendant moved at special term for a new taxation, that the costs allowed plaintiffs be stricken from the judgment and defendant's costs inserted in place thereof, and that the clerk be required to enter judgment against the plaintiffs for the amount of defendant's costs less \$12.02, the sum found by the referee to be due them. This motion was denied, and this appeal taken from the order thereupon entered.

George Scramling, for appellant.

L. E. Bowe, for respondent.

BOCKES, J.—I am of the opinion that this case was within the jurisdiction of a justice's court. The question is whether the sum total of the accounts ['] between the parties exceed \$400; that is, as we shall hereafter see, whether the balance of accounts between the parties, after an application of all payments made by them, exceeded \$400. This question is to be determined by the findings of the referee (*Fuller v. Conde*, 47 N. Y. 89), which in this case state specifically the claims of the respective parties, the nature of the claims, and the payments made. It must be held in mind that payments go in *extinguishment* of the accounts, and that it is the *balance* unpaid after an application of the payments which settles the question of jurisdiction. In *Crim v. Cronkhite* (15 How. Pr. 250) the referee found that the plaintiff's claims ['] as proved amounted to \$260.90; that the defendant's payments and counter-claim, as established by the proof, amounted to \$232.28; and that the pay-

Bundick v. Hale.

ments included in the latter sum amounted to \$95.85. The recovery by the plaintiff being less than \$50, it was held that the defendant was entitled to costs. In

Matteson v. Bloomfield (10 *Wend.* 555), the sum ['] total of the plaintiff's demands, as proved, was \$550.36. Payments were proved to have been made reducing the balance remaining due to less than \$50. Costs to the plaintiff were refused. In *Mills v. N. Y. C. P.* (10 *Wend.* 557, note) the plaintiff's demands were in the aggregate \$521.60 ; the defendant's set-off, as claimed, was \$143, and his payments \$374.68.

The referee certified that the demand of the plaintiff, "as established at the trial, exceeded \$400, which was diminished more than \$300 by divers payments." The recovery was less than \$50. Costs to the plaintiff were refused. In this case Judge NELSON said, "The debts, demands, and accounts of both parties in dispute, between them did exceed \$400. The accounts, as exhibited, exceeded that sum, but payments were shown on each side ; and as far forth as payments were made, the account or demand of each of the parties was extinguished." The learned judge added, in conclusion, "The payments mutually made cannot be considered as debts, demands, or accounts within the meaning of this statute ; and deducting them from the accounts, the whole amount in controversy was less than \$100." So in *Lamoure v. Caryl* (4 *Denio*, 370, 372)

it is said that when payments have been made, ['] the balance only would constitute a claim, demand, or account within the statute. The same rule of construction is recognized in *Fuller v. Conde* (47 *N. Y.* 89), and was there given application by the court.

['] So it was held in this case (*Fuller v. Conde*), that although the claims in suit exceeded \$400, yet as there was an extinguishment of them by payment to an extent that left the balance less than \$400 on the

Bundick v. Hale.

plaintiff's recovery being \$50, the defendant, and not the plaintiffs, was entitled to costs.

Now let us apply the law so settled by repeated decisions to the case in hand. The question is, did the balance of the accounts between the parties, after ['] an allowance of the payments, exceed \$400. Most certainly it did not. This is clearly shown by tabulating the items of the claims of the respective parties, setting down in the table the items of payment allowed by the referee. The case thus stands on the facts as follows :

Def't. in account with pl'tf's firm.	Cr.	Dr.
Goods, etc.		\$308.28
Cash advanced		165.70
		473.98
By lumber, hides, etc.	\$69.83	
" Cash paid on account	198.90	
" Payt. July 19, 1878	175.00	
" Payt. Dec. 13, 1878	20.00	
Judgment for bal.	10.25	
	\$473.98	\$473.98

Now certainly here are three items of payments, to wit, \$198.90, \$175.00, \$20.00, aggregating \$393.90. To this extent, according to the cases cited, the plaintiff's account, demand or claim was extinguished, and to adopt the language of the court in *Lamoure v. Caryl* (*supra*), "the balance only constituted the claim, demand or account within the statute," to be considered in determining the question of jurisdiction. The balance in this case under this construction of the law, was but \$141.91 ; hence, it was a case within the jurisdiction of a justice's court. It really makes no difference whether the defendant's payments be applied in extinguishment of the money advancements, or in extinguishment of the items for goods, etc., sold and delivered. If applied upon the demand, for money ad-

Bundick v. Hale.

vanced, the payment extinguished that demand, and left a balance of \$228.20 to apply on the item for goods, etc. If applied upon the demand for goods, etc., the payment extinguished that demand and left \$85.62 to apply on the money advances. It comes to this, that

the payments by the defendants operated in extinguishment of the plaintiff's *pro tanto*, and only the

balance of the accounts between the parties can be taken into consideration in determining the question of jurisdiction here presented. Make the extinguishment by an application of the payment, and the balance of those accounts falls far short of \$400. The case was therefore within the jurisdiction of a justice's court. I need not comment on the distinction which exists and is to be observed, in cases like the present, between payment and set-off. The question here is as to the effect of payments.

The referee awarded costs to the plaintiff. In this he was in error; indeed, he had no right to pass [19] upon that question (*Fuller v. Conde*, 47 N. Y. 89).

The right to costs is declared by statute, and is absolute on the facts found to exist.

I am of the opinion, therefore, that the order appealed from should be reversed; and that the motion made by the defendant should be granted. This will, in effect, also reverse that part of the judgment appealed from. The defendant should have \$10 costs of appeal and disbursements for printing; and also \$10 costs of motion at special term.

Masterson v. Mayor, &c. of N. Y.

MASTERSON v. THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF NEW YORK.SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM,
JANUARY, 1884.

§ 531.

Bill of particulars—When right to, lost by laches.

When a motion for a bill of particulars of plaintiff's claim in an action against a municipal corporation to recover damages resulting from a breach of contract was made after the case was on the day calendar of the court, and it appeared that the defendant had the deposition of plaintiff's foreman taken before its comptroller prior to the commencement of the action, to which was annexed a schedule setting forth the particulars sought,—*Held*, that the motion should be denied; that the defendant ought not to be permitted on the eve of the trial to embarrass the plaintiff by such a motion.

(Decided January 12, 1884.)

Motion by defendants for a bill of particulars of plaintiff's claim.

This action was brought to recover damages for the alleged breach of a contract made between the plaintiff and the defendants for the construction of a certain sewer in Tenth avenue between eighty-third and ninety-second streets in the city of New York.

The complaint alleges that one of the conditions of the agreement was that no other contracts should be entered into by the defendant with any other parties upon the line of this work which should increase the amount of labor contracted to be rendered, or which

Masterson v. Mayor, &c. of N. Y.

should interfere with or obstruct the plaintiff in the prosecution and completion of his contract with the defendant within the time limited and agreed; that during the pendency of his contract the defendant by its commissioner of public works executed and delivered a second contract for work in the same part of the city to one James Baird; that the said Baird under his said contract so executed his work as to impede and interfere with the work of the plaintiff under his said contract with the defendant; that, in consequence of this second contract to said Baird, the plaintiff was put to great expense in excess of any expense contemplated in his said contract for necessary bailing and pumping of water out of his excavations, for drilling and blasting rock under water, and by reason of the breaking down of the banks of the excavations made by said plaintiff; that by reason thereof the plaintiff was compelled to pay and did pay for the completion of the work specified in his contract and for the obstructions, as aforesaid, other than in the way of its completion, sums to the amount of \$15,000, for which sum he demands judgment.

Issue was joined; the case noticed for trial and placed upon the general calendar, and on December 10, 1883, it was reached in its order on the calendar; and was adjourned to December 11, and on that day again adjourned. December 25, 1883, defendant demanded a bill of particulars, and on January 4, 1884, and before the cause was again reached for trial, procured an order that the plaintiff show cause why he should not serve a bill of particulars and staying his proceedings in the meantime, on which this motion arises.

On the motion it appeared by affidavit that prior to the commencement of the action the comptroller of the city of New York had examined plaintiff's foreman, to whose deposition there was attached a statement

Mershon v. Leonard Scott Publishing Co.

showing the amounts paid out on said contract for material and labor on each day during the prosecution thereof, and also that during the prosecution of the work it was inspected by surveyors and inspectors in the employ of the defendants.

George P. Andrews, counsel to the corporation, for the motion.

Horace Barnard, opposed.

BARRETT, J.—Considering that the defendants have the plaintiff's deposition taken before the comptroller, with the schedule among the papers, and considering that they rested on the information thus obtained and suffered the case to proceed without asking a bill of particulars, they ought not to be permitted, upon the eve of the trial, to embarrass the plaintiff by a motion of this kind.

Motion denied, \$10 costs to abide the event.

MERSHON ET AL. v. LEONARD SCOTT PUBLISH-
ING COMPANY.

CITY COURT OF NEW YORK, SPECIAL TERM, DECEM-
BER, 1883.

§§ 636, 3169.

Attachment—when cannot be issued out of city court of New York against domestic corporation.

An attachment cannot be issued out of the city court of New York against a domestic corporation, on the ground that it has removed or disposed of its property with intent to cheat and defraud its creditors.

(Decided December 18, 1883.)

Mershon v. Leonard Scott Publishing Co.

Motion by defendant to vacate an attachment issued against its property.

An attachment was issued against the property of the defendant, which is a domestic corporation, on the ground that it had disposed of its property with intent to cheat and defraud its creditors.

William P. S. Melvin, for motion.

Henry F. Anderson, opposed.

MCADAM, J.—The question presented for decision is whether an attachment can lawfully issue out of this court against a domestic corporation having its principal place of business within the city of New York, on the ground that the corporation has removed or disposed of its property with intent to cheat and defraud its creditors. The language of section 636 of the Code, applicable to the superior courts of record, clearly comprehends such a case. But that section, in its application to this court, is so limited by section 3169 as to exclude from this court jurisdiction in a case like the present. If this be not so, there is neither force nor meaning in the limitation which section 3169 imposes. The language of section 636 is clear, and if it was intended to give the city court similar power to that embraced therein, it may well be asked what section 3169 was intended for. That section either excludes this case from the jurisdiction of this court, or the legislative intent has been so obscured by inapt language that effect cannot be given to it without assuming jurisdiction of a doubtful character. It follows that the attachment must be vacated, but without costs.

LEE v. LEE.

SUPERIOR COURT OF THE CITY OF NEW YORK,
SPECIAL TERM, DECEMBER 1883.

§ 1769.

Alimony—Court may grant wife, in action by husband to annul marriage.

In an action by a husband to annul his marriage on the ground that it was induced by fraud and duress, the court may grant the wife alimony and counsel fee.*

The allowance of alimony in an action for divorce, separation, or to annul a marriage, does not depend wholly upon the statute, but upon the practice of the court as it existed prior to the enactment of the Revised Statutes.

North v. North (1 Barb. Chan. 241), Brinkley v. Brinkley (50 N. Y. 190), followed.

(Decided December 31, 1883).

Motion by defendant for alimony and counsel fee in action to annul marriage.

The plaintiff, Henry Lee, brought this action to have his marriage with the defendant annulled, on the ground that he was induced to marry her by fraud and duress, and while under arrest upon a charge that he had seduced the defendant under promise to marry. He alleges that he married her to procure his release from imprisonment, and that they have never lived together as husband and wife.

* See Ramsden v. Ramsden, 2 N. Y. Civ. Pro. 416; Collins v. Collins, 80 N. Y. 1; S. C., 71 N. Y. 269; Kinzey v. Kinzey, 7 Daly, 460; Allen v. Allen, 59 How. Pr. 27; S. C., 3 Abb. N. C. 175; Bloodgood v. Bloodgood, 59 How. Pr. 42.

Lee v. Lee.

J. C. J. Langbein, for the motion.

Rufus F. Andrews, opposed.

TRUAX, J.—Title one of chapter 15 of the Code of Civil Procedure is substantially the same as articles 1, 2, 3, 4, and 5 of title one, chapter 8, part 2 of the Revised Statutes.* Alimony and counsel fee were allowed the wife in an action to annul a marriage where the action was brought by the husband while these portions of the Revised Statutes were in force.

In *North v. North* (1 *Barb. Chan.* 241), the Chancellor said: "The provision of the Revised Statutes on the subject of allowance to the wife to enable her to carry on the suit, is confined to suits brought for a divorce or a separation, and does not in terms extend to the allowance of *ad interim* alimony even in these cases. But the allowance does not depend wholly upon the statute, but upon the practice of the court as it existed prior to the enactment of the Revised Statutes." This case was cited with approval by the court of appeals in *Griffin v. Griffin* (47 *N. Y.* 137), and *Brinkley v. Brinkley* (50 *N. Y.* 190).

In the last case the principle upon which alimony and counsel fee were allowed was stated as follows: "When an actual marital relation has been admitted or shown, and its existence is sought to be avoided by some fact set up by the husband, and it devolves upon him to show that fact, alimony will be granted until that fact is shown."

Alimony at \$5 a week, and a counsel fee of \$25 is allowed.

* 2 *R. S.* 142, *et seq.*

Hagerty v. Andrews.

**HAGERTY AND ANOTHER, APPELLANTS, v.
ANDREWS ET AL., RESPONDENTS.****COURT OF APPEALS, NOVEMBER, 1888.****§§ 545, 1543.**

Partition.—When defendant must litigate title in action for.—Irrelevant and redundant matter.—Propriety of making moving party a defendant cannot be determined on motion to strike out allegations in complaint referring to him.—What is irrelevant and redundant matter in pleading.

In an action for partition, it seems that defendants claiming an interest in or lien upon the premises sought to be partitioned will be obliged to litigate the validity thereof with a co-defendant who, under section 1543 of the Code of Civil Procedure, controverts their interest or lien, notwithstanding all the allegations in the complaint relating to their interest in the premises has been struck out by order of the court. [1]

Where a pleading contains the semblance of a cause of action or defense, its sufficiency cannot be determined upon a motion to strike it out as irrelevant or redundant. [2] The question as to the sufficiency of a pleading in stating a cause of action or defense against a party, or as to his liability upon a given state of facts, can properly be raised only by a demurrer to such pleading. [3, 4] On a motion to strike out the allegations of a complaint referring to the interest of a defendant, as irrelevant and redundant, the question whether he was properly made a party defendant cannot be raised or determined. [5]

The power of the court to expunge matter from a pleading, upon motion, for irrelevancy refers to such matter as is irrelevant to the cause of action or defense attempted to be stated in the pleading against the party moving to expunge, and does not enable a party to strike out allegations relating to himself because they are irrelevant to an alleged cause of action against some other party.

(Decided December 4, 1888.)

Appeal from an order of the general term of the city court of Brooklyn, affirming an order of the special term of said court, striking out part of the complaint, &c., as irrelevant and redundant.

Hagerty v. Andrews.

The action is brought to obtain partition of certain lands in the city of Brooklyn. It is alleged in the complaint that the defendants, Benjamin Andrews and William A. Husted, respectively, claim to have certain liens upon the said premises by virtue of owning and holding certain certificates of sale thereof, which were made for the non-payment of certain taxes and water rates, and are described therein, that the plaintiffs are ignorant of the validity of said claim, because of the want of sufficient record evidence, that the said sales and the proceedings thereon were regular according to law in such cases made and provided. The judgment demands that the right, share, interest or lien of the plaintiffs, and each of the defendants, to the said premises be ascertained, declared and determined, and for partition and division, etc. The defendants, George M. Nichols and wife, answered, alleging that the liens of Andrews and Husted are each null and void, a copy of which answer was served on the attorney for said defendants. A motion was made by the defendants, Andrews and Husted, upon notice to strike out all the allegations of the complaint relating to the certificates of sale, held by the defendants, Andrews and Husted, and also striking out all the allegations of Nichols and wife, relating to the same, upon the grounds that all said allegations were irrelevant, the said certificates not being liens upon, or constituting an interest in the land, and the validity thereof not triable in an action of partition. The special term granted the motion. The plaintiff appealed to the general term, which, being divided, the order of the special term was affirmed.

* *John T. Barnard*, for appellants.

John Andrews, for respondents.

Hagerty v. Andrews.

RUGER, Ch. J.—The question attempted to be raised by the respondents in this proceeding was, whether upon the facts stated in the complaint, they were properly made parties defendant in this action.

The objection went to the entire cause of action, as stated against them, and the necessary effect of a decision in their favor, was to leave them in as parties to the action, but with nothing in the pleadings to indicate their connection with the subject matter, except the allegations in the answer of their co-defendants, George M. Nichols and Mary Jane, his wife, alleging the invalidity of their liens.

It may well be doubted, even if the order appealed from should be allowed to stand, whether the respondents have secured any exemption from their ['] responsibility as defendants in the action. It is quite clear that under section 1543 of the Code of Civil Procedure, they would still be obliged to litigate with their co-defendants, the Nichols, the validity of their liens upon the premises sought to be partitioned, notwithstanding all the allegations in the complaint relating to their interest in the premises had been struck out by order of the court. But it is quite evident that the question as to whether a person ['] has been properly made a party defendant in an action cannot be raised upon a motion to strike out the allegations in the complaint referring to his interest in such action. The Code authorizes the party aggrieved thereby to move to strike out irrelevant, redundant or scandalous matter contained in a pleading; but it is a new application of the privileges conferred by this provision to move to strike out a pleading because it does not state a good cause of action against the moving party. Questions as to the sufficiency of a pleading in stating a cause of action or defense against a party, or as to his liability upon a given state of facts, can properly be raised only by a demurrer to

Hagerty v. Andrews.

such pleadings. When the pleading contains the
['] semblance of a cause of action or defense, its
sufficiency cannot be determined upon a motion to
strike it out as irrelevant or redundant (Walter v.
Fowler, 85 N. Y. 621).

It cannot be claimed that the portions of the complaint which were struck out by the order appealed from, were either scandalous or redundant, and it follows that if they are struck out at all, it must be upon the ground that they are irrelevant. It would be confounding the remedies provided by the several sections of the Code to hold that the motion to strike out matter from a pleading was applicable to a
['] case where there was an absence of allegations of fact sufficient to constitute a cause of action or defense.

The power given to a court to expunge matter from a pleading upon motion for irrelevancy, refers to
['] such matter as is irrelevant to the cause of action or defense attempted to be stated in the pleading against the party moving to expunge; and does not enable a party to strike out allegations relating to himself, because they are irrelevant to an alleged cause of action against some other party. We are therefore of the opinion that this appeal does not bring up the question attempted to be raised, and which was argued before us; and that we cannot properly pass upon that point.

The orders of the general and special terms must therefore be reversed, with costs in both courts to the appellants.

All concur.

Neely v. McGrandle.

NEELY ET AL. v. McGRANDLE AND ANO.

CITY COURT OF NEW YORK, SPECIAL TERM, DECEMBER, 1883.

§§ 338, 641.

Attachment—Cannot be issued out of city court of New York to sheriff of any county other than New York.

The city court of New York has no power to issue an attachment to the sheriff of any county other than New York.

(Decided December 18, 1883.)

Ex parte application by plaintiffs for an attachment against the property of the defendants directed to the sheriff of Kings county.

The action was brought to recover a balance alleged to be due the plaintiffs for merchandise sold and delivered by them to the defendants. It appeared by affidavit that the defendants were copartners doing business as such in the city of Brooklyn, and that one of them was a non-resident of the state residing in Jersey City, N. J.

William C. Davidson, for plaintiffs.

MCADAM, J.—This court has no power to issue an attachment to the sheriff of another county. The provisions of section 641 of the Code are limited in their application to this court by the language of section 338, which enumerates the writs issuing out of the city court which may be executed in other counties. So limited, there is no power in this court to grant the attachment applied for. Application denied.

Briggs v. Taylor.

BRIGGS v. TAYLOR.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM,
JANUARY, 1884.

§§ 870, 872.

Examination of party before trial—Where party may be examined at his own instance before trial.

The deposition of a party may be taken at his own instance at any time before trial as prescribed in Chapter 9, Title 3, Article 1 of the Code of Civil Procedure.

Where a plaintiff applied for his own examination before trial on affidavits setting forth the particulars required by subdivisions 1, 2, 3 and 4 of section 872 of the Code, and facts showing that his testimony would be material and necessary on the trial of the action and alleging that he was about to depart from the state on business and would probably be absent at the time the case would be called for trial; *Held*, that his motion should be granted, notwithstanding that subdivision 5 of section 872 of the Code, excepts parties to the action from examination before trial when the sole ground for such examination is that such party is about to leave the state or is so sick or infirm as to render it probable that he will not be able to attend the trial.

(Decided January 28, 1884.)

Motion that an order for the examination of a party before trial, at his own instance, be vacated.

An order for the examination of the plaintiff was granted January 21, 1884, on affidavits which showed that the action was pending, and had not been tried; the names of the parties with their residences; that they had all appeared; the names and office addresses of the attorneys by whom they appeared, the nature of the action and the substance of the judgment demanded; that the defendant had answered and the nature of his defense; the name and residence of the

Briggs v. Taylor.

person to be examined ; that his testimony was material and necessary to plaintiff and the facts intended to be established by the testimony of the plaintiff from which it was evident that the testimony was material and necessary.

It was also alleged in said affidavits that the "plaintiff is about to depart from the state for the purpose of going to Billings in the territory of Montana, where said plaintiff is engaged in business which will require his attendance until November or December, 1884, and said plaintiff intends leaving the state of New York on or before the 28th day of January inst., and this action is now upon the day calendar of Part II. of this court and as deponent is informed and believes cannot be tried before the departure of said plaintiff."

B. F. Tracy (*Joseph W. Carroll*, attorney), for defendant and motion, cited: *Preston v. Hencken*, 9 *Abb. N. C.* 68.

Russell Benedict, for plaintiff, opposed.

J. F. DALY, J.—Section 872, subdivision 5, of the Code excepts parties to the action from examination before trial when the sole ground for such examination is that such party is about to leave the state or is so sick or infirm as to render it probable that he will not be able to attend the trial. The Code was amended in 1878, however (section 870), by enacting generally, that the deposition of a party might be taken at his own instance at any time before the trial as prescribed in the article, of which 870 and 872 form a part. This amendment was rendered necessary by the discovery that under the new Code, there was no provision for perpetuating a party's testimony (*Montague v. Worsell*, 55 *How. Pr.* 406, see also note, *Id.* 525).

Motion granted for examination.

Andrews v. Keene.

ANDREWS, APPELLANT, v. KEENE, IMPLEADED,
ETC., RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, OCTOBER, 1883.

§ 870.

Examination of party before trial not allowed in actions on tort.

An order for the examination of a party before trial, in an action on tort, where the object of the examination is to procure evidence to establish charges of fraud, deceit and fraudulent conspiracy upon which the action rests, will be vacated.[¹]

Yamato Trading Co. v. Brown (25 Hun, 248), followed; [²] Canada Steamship Co. v. Sinclair (3 N. Y. Civ. Pro. 385), distinguished.[³]
(Decided December 21, 1883.)

Appeal from an order vacating an order for the examination of the defendant Keene before trial.

The affidavit on which the order was granted, and the complaint show that the action is for the recovery of a sum of money alleged to have been obtained from the plaintiff as the price of certain mining stocks, on the ground that the defendants conspired together to defraud purchasers by means of false representations of matters of fact affecting the value of the property of the companies and their financial condition. The affidavit makes the following statement as to the necessity and materiality of the testimony sought to be obtained from the defendant: "The plaintiff cannot safely proceed to trial until he has examined the defendant Keene, as to his part in said transactions, and as to his relations to the other defendants, and his knowledge of what the representations made by the other defendants were, and his knowledge of the truth thereof, and as to what share or portion of the moneys paid by plaintiff he received. The testimony of said defendant Keene is

Andrews v. Keene.

material and necessary to the plaintiff herein for the purpose of prosecuting this action, and for the purpose of proving and establishing the allegations of the complaint upon the trial of this action. The books, papers and vouchers and receipts of said defendant Keene, containing the record of his dealings and transactions in relation to the matters in suit above set forth, and showing the amounts received by him from the other defendants on account of subscriptions to the capital stock of said company are necessary upon said examination to show the said transactions in detail, and for a complete examination of said defendant Keene."

Harry Wilber, for appellant.

When this action is tried, if the defendant Keene is called, he can assert his privilege as a witness. So he could in any other action, whether in tort or on contract. If sued on a note, he might deem that an answer would subject him to indictment for perjury or forgery, or fraud. Having asserted his privilege, it would be for the court to sustain it or disallow it (*Abbott's Trial Evidence*, 620; *Fellows v. Wilson*, 31 *Barb.* 162; *People v. Mather*, 4 *Wend.* 229) The question may be put, and must be answered, unless the court, after it is put, finds that it may criminate (*Abbott Tr. Ev.* 620; *Fellows v. Wilson*, *supra*). In this case we have a right to have the ruling after the question is asked; the court cannot in advance tell what the question will be.

In *Yamato Trading Co. v. Brown* (27 *Hun*, 250), and also in the cases there cited, the decision was put upon the ground that fraud personal to the witness was the gist and entire substance of the action (see also *Kenney v. Roberts*, 26 *Hun*, 169).

William G. Choate (*Shipman, Barlow, Larocque & Choate*, attorneys), for respondent.

Andrews v. Keene.

Where it clearly appears upon the papers that the purpose of the proposed examination is to elicit testimony to be used in proof of a criminal offense, the order for the examination should be vacated on the ground that such testimony is not material and necessary within the meaning of the statute, inasmuch as it cannot, if taken, be used against the defendant's objection that it would tend to criminate him (*Yamato Trading Co. v. Brown*, 27 *Hun*, 248; *Corbett v. De Comeau*, 5 *Abb. N. C.* 169; *Kenney v. Roberts*, 26 *Hun*, 166; *Burbank v. Reed*, 11 *N. Y. Weekly Dig.* 576).

BRADY, J.—This action is one which, under the old system, would be embraced within those designated as actions on tort, and rests upon charges of fraud and deceit for the purpose of obtaining money. The first allegation in the complaint is that the defendants and others unknown to the plaintiff, for the purpose of obtaining money by fraud and deceit, on or about a certain day, procured the organization of two companies; and it is further charged, that in pursuance of such fraudulent and deceitful purpose the defendants did certain things particularly set out; and further, that the money received from the plaintiff was received in pursuance of the purpose for which the company was organized and the representations made. The action is, therefore, one which rests entirely upon charges of fraud, deceit and fraudulent conspiracy. It seems to be well settled that in such an action an order for the examination of the party will be vacated when the object of it is to procure testimony to establish the fraud charged. This doctrine rests upon the provisions of the constitution of this state, which declares that no person shall be compelled, in any criminal case, to be a witness against himself.

Yamato Trading Co. v. Brown (decided in this

Andrews v. Keene.

department and reported in 25 *Hun*, 248) is in point upon the question involved upon this appeal, in ['] which it was decided that when the object of the examination, as already suggested, is to show by the testimony of the party that he procured property from the plaintiff by means of false and fraudulent representations the order for his examination should be vacated (see also *Kenney v. Roberts*, 26 *Hun*, 166; *Corbett v. De Comeau*, 5 *Abb. N. C.* 169; *Burbank v. Reed*, 11 *N. Y. Weekly Dig.* 576).

The case of the *Canada Steamship Co. v. Sinclair* (reported in 3 *N. Y. Civ. Pro.* 285), is not in conflict with the cases referred to. But if it were, it would not be regarded as overruling (being a special term case) the decision of the general term of this department. That case, however, is distinguishable from this, in that it was commenced to recover property or its value, and the object of the examination was to show how much of the property which was stolen from the plaintiffs came into the possession of the defendant.

The court held that the possession of the goods is not of itself a crime. It was necessary if they were bought by the defendants to show that they were purchased with a knowledge of their being stolen. If the proposition was recognized as it should have been, that if it appeared that the testimony which the party sought related exclusively to frauds which amounted to a crime, the order could not be maintained.

For these reasons the order appealed from was properly made, and should be sustained.

The judgment of the court is therefore, that the order appealed be affirmed, with \$10 costs and disbursements.

DAVIS, P. J., and DANIELS, J., concurred.

Grow v. Snell.

GROW, RESPONDENT v. SNELL, IMPLEADED, ETC.,
APPELLANT.

SUPREME COURT, FOURTH DEPARTMENT, GENERAL
TERM, JANUARY, 1883.

§§ 1327, 1331.

Court cannot decide abstract question of law disconnected from granting of relief—What undertakings will stay the execution of a judgment of foreclosure and sale in an action to foreclose a mortgage pending appeal therefrom.

It is not the province of courts to decide abstract questions of law disconnected from the granting of actual relief.['] Such decisions would bind no one. [']

Where, in an action to foreclose a mortgage, the defendant upon appeal to the general term, from a judgment of foreclosure and sale, gave an undertaking, under the first sentence of section 1331 of the Code of Civil Procedure, to provide against waste, and for the payment of the value of the use and occupation of the premises, and on appeal to the court of appeals did not give another such undertaking, but did give an undertaking, as required by section 1326 of the Code to perfect the appeal, which also provided that if the judgment or any part thereof was affirmed or the appeal dismissed the appellants would pay the sum directed to be paid by the judgment or the part thereof affirmed, and the appellant applied to the special term to declare the proceedings of the plaintiff stayed until the determination of the appeal by the undertakings already given or to declare them stayed upon the execution of an undertaking as required by the first sentence of section 1331 of the Code, and also to declare that the giving of an undertaking under that part of said section was sufficient to stay proceedings and an order was entered in terms denying the motions but directing that the plaintiff's proceedings be stayed during the pendency of the appeal upon the giving of an undertaking as required by the latter part of section 1331 of the Code. *Held*, that the case was not one resting in the discretion of the court; ['; ''] that the statute prescribes what shall effect a stay, and if the undertakings given by the appellants were such as the statute required to be given for that purpose the appel-

Grow v. Snell.

lant needed no order and if they were not, no order assuming to stay proceedings could aid them; ['] Also *Held*, that it seems that the giving of an undertaking under the second sentence of section 1831 of the Code was not necessary to a stay in this case, ['] and that the appellant had an election either to give an undertaking to pay any deficiency or to give one conditioned against waste and to pay for use and occupation. [']

It seems that an undertaking given on appeal from a judgment of foreclosure and sale in form as prescribed by section 1827 of the Code of Civil Procedure, providing that if the judgment appealed from is affirmed the appellant will pay the sum recovered or directed by it to be paid, will not cover any deficiency arising on the sale of mortgaged premises; ['] that section applies only to decrees, absolutely requiring the payment of a sum fixed, or that might be ascertained by computation. [']

(Decided April, 1883.)

Appeal from an order of the Jefferson county special term.

The facts are stated in the opinion.

Wayland F. Ford, for appellant.

P. C. Williams, for respondent.

SMITH, P. J.—The order appealed from was made upon an application of a somewhat unusual character. The defendants, Snell and Horace Garlock appealed to the court of appeals from a judgment of this court affirming a judgment of the special term which directed a foreclosure and sale of mortgaged real estate, and required the payment of any deficiency that there might be and costs. They gave an undertaking as required by section 1826 of the code to perfect the appeal. The undertaking also provided, pursuant to section 1827, that if the judgment or any part thereof should be affirmed, or the appeal dismissed, the appellants would pay the sum directed to be paid by the judgment or the part thereof affirmed. On the

Grow v. Snell

appeal to the general term, they had given an undertaking providing against waste, and for the payment of the value of the use and occupation of the premises as required by the first sentence of section 1331, but no undertaking to that effect was given on the appeal to the court of appeals. Upon this state of facts the appellants applied to the special term to *declare* the proceedings of the plaintiff stayed until the determination of the appeal, by the undertakings given, or to declare them stayed upon the execution of an undertaking as required by the first part of section 1331, and also to declare that the giving of an undertaking under the first part of that section is sufficient to stay proceedings. In other words, the appellants did not ask the special term to direct, permit or prohibit the doing or undoing of any act, but merely to say whether the undertakings given had worked a stay, or whether that result would follow in case a certain other undertaking were given.

The case is not one resting on the discretion of ['] the court. The statute prescribes what shall effect a stay. If the undertakings given by the appellants were such as the statute required to be given for that purpose the appellants needed no order; if they were not, no order assuming to stay proceedings could aid them.

Cases are numerous in which the court or a judge thereof may grant a stay on terms, or otherwise, as matter of discretion, but this is not such a case.

['] And the appellants did not apply for that relief.

They did not ask that the court direct a stay, but they asked that the court declare that what the appellants had done, or what they suggested they might do, was, or would be, sufficient to effect a stay. They did not even state their readiness or ability to give the undertaking suggested by them; but as has been said, their so-called motion was merely a request that the

Grow v. Snell.

court would inform them upon an abstract question of practice. There are two ways in which the questions argued by counsel might have been presented for adjudication. If, after the undertakings already filed were put in, the respondent had proceeded to enforce his judgment, the appellants might have moved to set aside such proceedings as irregular; or, if the appellants had omitted to file the requisite undertaking, they might have applied for leave to file the same, on terms, on excusing their default. It is not the province of courts to decide abstract questions of law ['] disconnected from the granting of actual relief (*People ex rel. Geer v. Common Council of City of Troy*, 82 *N. Y.* 575). Such decisions would bind no one.

The order of the special term purported to deny the motion, except that it directed the plaintiff's proceedings stayed during the pendency of the appeal on the appellants giving an undertaking as required by the latter part of section 1331 of the Code. The first part of the order was equivalent to an expression of the opinion that the giving of the particular undertaking therein described was necessary to effect a stay, and inasmuch as, if the opinion was correct, the giving of such undertaking would have worked a stay, *proprio vigore*, the remainder of the order was superfluous and of no effect. Upon this ground the entire order might properly be reversed.

But as the parties may be saved a repetition of motions by an expression of our views upon the questions which they have argued upon this appeal, we proceed to consider them.

We do not concur in the opinion of the learned judge at special term, that the giving of an undertaking under the second sentence of section 1331 is necessary to a stay in this case. That part of the section (which was adopted as an amendment in 1879) had the effect, as we understand it, to give to an appel-

Grow v. Snell.

lant from a judgment directing a sale of mortgaged premises, his election to give the undertaking therein prescribed, the condition of which is to pay any deficiency, or to give one under the first clause of the section, conditioned against waste, and to pay for use and occupation. Prior to the amendment of 1879, he was required to do both, and from that burden he is now relieved. The amendment evidently was adopted upon the idea that if the plaintiff is secured against any deficiency, there is no occasion for indemnifying him against waste or loss of the value of the use; and on the other hand, if the consequences of waste, and the value of the use, are made up to the plaintiff, the appellant shall not be required to make good any deficiency. It is true that in this view of the statute an appellant may stay the plaintiff's proceedings without providing against a deficiency arising from accumulation of interest, depreciation in the market value of the mortgaged premises, or damage or destruction of buildings by fire; but if there is an omission in this respect, it can only be remedied by the legislature.

We do not concur in the opinion of the judge at special term, that section 1331, as amended, contemplates two distinct classes of cases, and provides a separate undertaking for each. It is clear that prior to the amendment of 1879 the section related to but one class of cases, to wit, an appeal from a judgment "entitling the respondent to the immediate possession of real property, or from a judgment or order, directing the sale or the delivery of possession of real property." It was a substitute for section 338 of the old Code, which was limited to an appeal from a judgment "directing the sale or delivery of possession of real property." Of that class is a judgment for the sale of mortgaged premises, and it was so treated in the old section and the new. The present section, as amended, does not treat it otherwise; it simply makes it an

Grow v. Snell.

exception to the class by providing that instead of the undertaking specified in the first part of the section which is still applicable to the entire class, including judgments for the sale of mortgaged premises, it shall be *sufficient* to give an undertaking prescribed by the amendment. It is not made obligatory to do so.

The suggestion that an undertaking in the form prescribed by section 1327 would cover any deficiency arising on the sale of the mortgaged premises is ['] unfounded. That section is substantially like section 82 (2 R. S. 606) respecting appeals from orders or decrees of the court of chancery, directing the payment of money. The construction given to that section in several reported cases, is adverse to the view ['] suggested. It is to the effect that the section applied only to decrees absolutely requiring the payment of a sum fixed, or that might be ascertained by computation (see *The City Bank v. Bangs*, 4 *Paige*, 285; *Quackenbush v. Leonard*, 10 *Id.* 131; *Wright v. Miller*, 3 *Barb. Ch.* 382; see also *Curtis v. Blatchford*, 10 *How. Pr.* 481), in which the cases above mentioned are relied upon in giving a similar construction to section 335 of the Old Code.

Order reversed without costs to either party.

HARDIN and BOOKES, JJ., concurred.

Lawrence v. Foxwell.

BENJAMIN LAWRENCE, ET AL., APPELLANTS, v.
CHARLES FOXWELL, RESPONDENT.

SUPERIOR COURT OF NEW YORK; GENERAL TERM,
MAY, 1883.

§ 549.

Pleading.—Action to enforce liability fraudulently contracted.—

§ 549, sub. 4.

It is not the intention of the Code to permit judgment for fraud in an action under sub-division 4 of section 549, upon the general allegation that there was fraud; and where the complaint, after duly setting forth a cause of action on contract, states "that the defendant was guilty of a fraud in contracting and incurring liability, in that," etc., and there are no averments of facts which constitute fraud, such complaint may be dismissed on the trial, upon the ground that it does not state facts sufficient to constitute a cause of action.

A complaint which states that at the time of the purchase of the goods by defendant, and to induce plaintiffs to sell them to him on credit, he stated that he had sold the same to another, etc.; that, relying upon this, plaintiffs made the sale; and that said goods had not been so sold by defendant, etc., does not state a good cause of action for fraud, there being no allegation that the representations were fraudulently made, or with knowledge that they were not true, or with intent to defraud.

(Decided June 2, 1883.)

Appeal by plaintiff from judgment entered upon direction of judge at trial term that the complaint be dismissed, upon the ground that it did not state facts sufficient to constitute a cause of action.

The complaint, after duly stating a cause of action on contract, proceeded: "That the defendant was guilty of a fraud in contracting and incurring the liability, in that, on or about the 26th day of October, 1881, he called upon the plaintiffs, at their place of business in the city of New York, and applied to the plaintiffs to purchase

Lawrence v. Foxwell.

from them twenty-five cases of paper ; and, to induce said plaintiffs to sell him said goods on credit, stated to said plaintiffs that he had sold the said paper, and that he would pay for the same early in November, but that the goods should be billed to him on thirty days' credit, to enable him to collect from the party to whom he had sold the same, and that the said goods should be shipped by the New England Transportation Company to Boston, addressed to George C. Goodwin & Co. . . . That plaintiffs relied solely upon the representations of defendant, that he had sold the said paper to George C. Goodwin & Co., and shipped the goods as requested by the defendant, and billed the same at the agreed price of nine dollars per case, payable in thirty days. . . . That said goods were not in fact sold to George C. Goodwin & Co., or any other person or persons at the time said defendant so represented and stated, but that subsequently the said defendant sold thirteen of the said 25 cases to George C. Goodwin & Co., at eight dollars per case, and received the money therefor on or about the 28th October, 1881.' "

Ellis S. Yates, for appellant.

The Code substituted for the averments requisite under the common law practice, in complaints of fraudulent representations under this section (549), a mere bare allegation of fraud ; the section refers not to the sufficiency of the pleading, but solely to the maintaining of the order of arrest. The remedy, if the complaint had not stated that the defendant was guilty of a fraud in contracting or incurring the liability, was not the dismissal of the complaint, but simply the vacating the order of arrest. The whole intent of adding subdivision 4 to section 549, by the amendment of 1879, was to have the allegation of fraud made in the complaint instead of in an affidavit, and tried as an issue in the action by the jury

Lawrence v. Foxwell.

instead of by the court, and thus to change the method of enforcing a remedy, not to take it away (*Hecht v. Levy*, 20 *Hun*, 54). The cause of action for fraud was sufficiently pleaded.

H. F. Averill & W. T. B. Milliken, for respondent.

The action is in the nature of an action on the case, with the contract as only one of its facts, and the sufficiency of its pleading is to be determined by demurrer or motion (*Rowe v. Patterson*, 48 *Super. Ct.* 249; *Hecht v. Levy*, 20 *Hun*, 54). Subdivision 4 of section 549 of the Code requires the plaintiff to bring his action on the fraud, if he wishes an order of arrest, and procuring an order of arrest concludes him as to the nature of the action. In order to sustain his action he must allege and prove the fraud as well as the contract (*Code Civil Procedure*, §§ 549, 550). The complaint should allege facts sufficient to constitute a cause of action for deceit, or, in this case, for fraud in incurring the liability sought to be enforced (*Rowe v. Patterson*, 48 *Super. Ct.* 249). This the complaint fails to do. The allegation of the complaint is "that the defendant was guilty of a fraud in contracting and incurring the liability, in that," etc., limiting the general statement—so that it is equivalent not even to a positive general statement, but only to the averment that the facts alleged constitute a fraud, etc.

SEDGWICK, Ch. J.—The complaint began by sufficiently stating a cause of action for goods sold and delivered. It then proceeded, that the defendant was guilty of a fraud in contracting and incurring the liability, in that, in the bargaining for the sale, he did and said certain things. It was not alleged that any of his acts were fraudulently done. It alleged that certain things he represented to exist did not exist, but it was not alleged that any of his representations were fraudulently made, or with knowledge that they

Lawrence v. Foxwell.

were not true, or with intent to defraud the plaintiff. The answer admitted the sale for the price alleged in the complaint, but denied all the other allegations of the complaint.

On the trial, before testimony given, the defendant moved to dismiss the complaint; and the ground was, as I understand, that although the complaint averred that the defendant was guilty of fraud in contracting the indebtedness, no averments were made that facts existed which constituted the fraud, and that in such a case the plaintiff was not entitled to recover upon the sufficient allegations as to the sale and delivery.

I do not think that it is necessary to argue that it was not the intention of the Code to permit judgment in such a case for fraud, upon the general allegation that there was fraud. And it was clear that the complaint did not make sufficient averments as to fraud. The question that remains is, should the judge have refused to dismiss the complaint, or should he have retained it and given judgment for the breach of contract?

It is evident that the plaintiff did not wish a mere money judgment. The admissions of the answer sufficed to give him that; but when he brought the case on for trial, his demand was not only for a judgment of indebtedness on the part of the defendant, but of guilty of the fraud.

The claim is not one consisting of two separable parts, contract and fraud; it is an entire claim, comprehending both. If fraud be sufficiently alleged, but not proven, the plaintiff cannot fall back upon the cause of action on contract; he must go to another action. Where is the substantial difference between the case of untruly stating facts, the non-proving of a part of which prevents judgment for plaintiff, and the case of truly stating all that can be proved, but which, as matter of law, does not constitute fraud? If, in a

Fogg v. Fisk.

case like this, a judge should hold that there were sufficient allegations of fraud, there might be judgment for plaintiff under subdivision 4 of section 549 which would entitle the plaintiff to issue execution against defendant's person under section 1487. If this were held to be error, could the plaintiff retain the judgment on the ground that it was sustained by sufficient allegation of indebtedness that had been admitted by answer? It is right to hold the party, who begins an action, on the position that it is not one where he can obtain judgment only on contract, to that position, until it is ended, although, in one sense, the allegations as to the contract are sufficient; nevertheless, until, by a trial, to the expense and trouble of which he put the defendant, he was forced to abandon the claim so far as the fraud was concerned, he never asserted that the action was on contract pure and simple.

I therefore think that the judgment should be affirmed, with costs.

TRUAX and O'GORMAN, JJ., concurred.

FOGG v. FISK.

U. S. CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK, JANUARY, 1884.

§§ 870 *et seq.*, 881, 883.

Examination of party before trial.—Party cannot be examined at instance of adverse party before trial in action in U. S. Circuit Court.—Such examination if begun in state court prior to the removal of the action to the U. S. Circuit Court may be continued.—
Testimony so obtained, when and how used.

It is well settled in the second judicial circuit of the United States that the provisions of the U. S. Revised Statutes (§ 914) for conforming the practice of the Federal courts in suits at common law

Fogg v. Fisk.

to that of the State courts, does not apply to the taking of testimony, because the statutes of Congress cover the whole subject. [1] These statutes not only do not provide for the examination of a party as a witness for the adverse party before the trial, in actions at law, but do not permit evidence thus obtained to be used upon the trial as a substitute for the oral examination of the witness. [1]

While a party cannot be examined as a witness before trial at the instance of an adverse party in an action at common law, originally brought in the U. S. Circuit Court, [1] if such an examination had been ordered, and was pending at the time of the removal of an action from a State court to the U. S. circuit court under the Local Prejudice Act (18 U. S. Stat. at Large, 470), which saves to both parties the benefit of all proceedings taken in the action prior to its removal, the examination should be proceeded with, unless for some substantial reason the revisory power of the circuit court should be exercised. [2] Although the testimony so obtained cannot be used on the trial of the action, in the circuit court, as a substitute for the oral examination of the party, it can be as the declaration of a party, [4] and it can also be used in other suits in the courts of this State between the same parties or their privies. [4]

(Decided January 25, 1884.)

Motion that the examination of the defendant as a witness before trial begun before the removal of the action to the U. S. circuit court be continued.

This action was originally begun in the supreme court of this State, and an order for the examination of the defendant before trial was granted at the instance of the plaintiff. A motion to vacate the order was made at special term by the defendant, and it being denied, he appealed to the general term. The general term affirmed the order of the special term, and the defendant took an appeal from the order thereupon entered to the court of appeals, which dismissed it (93 N. Y. 652). Thereafter, and before the examination of the defendant was completed, the cause was removed to the U. S. circuit court upon the petition of the defendant.

Fogg v. Fisk.

John R. Dos Passos, for the motion.

Wheeler H. Peckham, opposed.

WALLACE, J.—At the time this suit was removed from the State court by the defendant, his examination as a witness was pending under an order of that court directing him to appear and be examined before the trial, as a witness, at the instance of the plaintiff. By the Code of Civil Procedure of this State, a deposition thus taken may be read in evidence by either party at the trial of the action, and also in any other action brought between the same parties, or between parties claiming under them or either of them (§ 881), and has the same effect as though the party were orally examined as a witness upon the trial (§ 883).

The plaintiff now moves for leave to proceed with the examination of the defendant pursuant to that order, and the defendant resists the application upon the ground that the examination of a party before the trial as a witness for the adverse party is not permitted by the practice of this court.

It is well settled in this circuit* that section 914, U. S. Rev. Statutes, for conforming the practice of the Federal courts in suits at common law as near as may be to that of the State courts, does not apply to ['] the taking of testimony, because the statutes of Congress cover the whole subject, and these statutes not only do not provide for the examination of a party as a witness for the adverse party before the trial in actions at law, but do not permit evidence thus obtained to be used upon the trial as a substitute for the oral examination of the witness (*U. S. Rev. Stat.* § 861; *Beardsley v. Littell*, 14 *Blatch.* 102; *United States v. Pings*, 4 *Fed. Rep.* 714).

* The second judicial circuit of the United States, including the districts of Vermont, Connecticut, and New York.

Fogg v. Fisk.

If, therefore, this were an action originally brought in this court, the plaintiff should not be permitted to proceed with the examination of the defendant.

[*] But the removal act of 1875* carefully saves to both parties the benefit of all proceedings taken in the action prior to its removal from the State court.

Section 4† declares that when any suit is removed from a State court to a circuit court of the United States, all injunction orders and other proceedings

[*] had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed. By force of this provision the plaintiff is entitled to proceed with the defendant's examination, unless for some substantial reason the revisory power of this court should be exercised to deprive him of the benefit of the order he has obtained and the proceeding he has instituted. It lies with the defendant therefore to present some controlling reason to the judicial discretion for denying to the plaintiff the right which he had secured, and of which he could not be deprived except by a removal of the suit.

That both parties have deemed this proceeding an important one is obvious from the tenacity with which

* Act of Congress passed March 3, 1875, ch. 137; 18 U. S. Stat. at Large, 470.

† This section is as follows: "When any suit shall be removed from a State court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner, as by law they would have been held to answer final judgment or decree, had it been rendered by the court in which suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal, shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings, had in such suit prior to its removal, shall remain in full force and effect until dissolved or modified by the court to which suit shall be removed."

Fogg v. Fisk.

the right to pursue it has been contested. It appears by the record and moving papers that the defendant has been defeated in efforts to vacate the order for his examination by the supreme court at special term and at general term, and by the court of appeals, and that although for a period of eighteen months he was willing to submit his rights to the State courts, he invoked the jurisdiction of this court when there were no other resources left by which he could escape an examination. Certainly there are no equities which should induce this court to deprive the plaintiff of the fruits of his long struggle. If the examination of the defendant could subserve no useful purpose to the plaintiff, undoubtedly the defendant should not be subjected to it, or be put to the annoyance or inconvenience which it might entail upon him. But although the defendant's testimony, when obtained, may not be of service to the plaintiff to the full extent it would be in the State courts, it may, nevertheless, be of ['] some value. If it cannot be used on the trial of this action as a substitute for the oral examination of the defendant, it can be as the declaration of a party; and it can also be used in other suits in the courts of this State between the same parties or their privies, pursuant to section 881 of the Code.

There seems to be no reason, therefore, for dissolving or modifying the order of the State court, or for denying to the plaintiff the benefit of the proceeding which was pending when the defendant removed the suit.

The motion is granted.

Tift v. Bloomberg.

TIFT, ET AL., RESPONDENTS, v. BLOOMBERG,
APPELLANT.

SUPERIOR COURT OF NEW YORK; GENERAL TERM,
NOVEMBER, 1883.

§ 544.

Supplemental answer.—When allowed.

Where the sufficiency of a proposed supplemental answer setting up newly discovered facts, is a matter of doubt, the court will not prejudge the validity of the defense on a motion, but will permit the defense to be set up if defendant be free from laches.

(Decided November 5, 1883.)

Appeal from order of special term denying defendant's motion for leave to serve supplemental answer.

This is an action of alleged false representation by defendant of the credit of third parties, viz., the firm of D. W. Bloomberg & Co., through which plaintiff sustained damage. After issue joined, defendant, at special term, moved for leave to interpose a supplemental answer, setting out facts, which he claimed transpired after the filing of the original answer, and constituted a defense to the action. The motion was denied on the ground that the new matter did not constitute a defense.

Further facts appear in the opinion.

Hall & Jenks, for appellant.

Adolph Ascher & John J. Adams, for respondents.

PER CURIAM.—INGRAHAM, J.—The supplemental answer sought to be interposed in this action, sets up the fact, that since the filing of the original answer, the

Tift v. Bloomberg.

assignees of D. W. Bloomberg & Co., mentioned in the complaint, have paid to the plaintiff \$634.34 on account of plaintiff's demand, and that plaintiff consented to the assignment, and agreed to accept their proportion of the estate of their debtor, and would relieve and discharge him from their claim. The affidavit on which the application was made disclosed that on March 1, 1883, the defendant first heard of the facts sought to be set up in the supplemental answer. On March 22, 1883, the order to show cause was obtained, and it does not appear that there was any laches in making the application.

Without passing on the validity of the defense set up in the proposed supplemental answer, we think that defendant should have been allowed to present on the trial the facts, and that the validity of the defense should not be disposed of on a motion. It was held by the general term of this court in the case of *Lyon v. Isen* (42 *How. Pr.* 155), that "If the sufficiency of the proposed answer is a matter of doubt, the court will not prejudice the matter on such a motion, but permit the defense to be made."

Without expressing an opinion on the validity of the defense sought to be interposed, we think substantial justice will be better obtained if defendant is allowed to present his defense on the trial, and have it passed on at that time.

Order appealed from reversed, and motion for leave to serve supplemental answer granted. Ten dollars costs, and disbursements of this appeal, to abide the event of the action.

SEDGWICK, Ch. J., concurs.

Lawrence v. Foxwell.

LAWRENCE, ET AL., RESPONDENTS, v. FOXWELL,
APPELLANT.

SUPERIOR COURT ; GENERAL TERM, MAY, 1883.

§ 549.

Order of arrest under sub. 4, § 549, Code Civ. Pro., when must be vacated.

In case the affidavit on which an order of arrest is granted shows that the action is on contract where the defendant has been guilty of a fraud in contracting (Code, § 549, sub. 4), and it does not appear therein that plaintiff has waived the contract, and elected to proceed for the fraud alone, in the absence of any allegation therein, showing that the complaint alleged that the defendant was guilty of a fraud in incurring the liability, no complaint having been presented upon the motion, the order of arrest must be vacated.

(Decided June 2, 1883.)

Appeal by defendant from order denying defendant's motion to vacate order of arrest.

The facts appear in the opinion.

H. F. Averill and *W. T. B. Milliken*, for appellant.

Ellis S. Yates, for respondent.

SEDGWICK, Ch. J.—The motion below was made upon the papers on which the order of arrest was granted. I am of opinion that the motion should have been granted.

The affidavit on which the order of arrest was made averred that a summons had been issued for service; that a sufficient cause of action existed, "arising out of the following facts;" that defendant bought certain goods for a certain price, and made certain statements in the course of the purchase; "and that by reason of

Lawrence S. Foxwell.

the foregoing fact this deponent alleges that the defendant has been guilty of a fraud in contracting the debt hereinbefore set forth; and that at the time he purchased said merchandize from deponent he did not intend to pay for the same, but intended to, and did, convert the same into money for his own use." The inference from these allegations is, that the action was upon contract, where the defendant had been guilty of fraud in contracting. There was in no part of the affidavit any allegation that the plaintiff elected to rescind the contract, and bring the action solely for damages from the fraud.

The right to the order depended, then, upon its being valid under the terms of subdivision 4 of section 549 of the Code of Civil Procedure. That subdivision gives as a condition of a right to arrest in an action on contract "that it is alleged in the complaint that the defendant was guilty of a fraud in contracting the liability." There was no complaint presented with the motion for the arrest, nor did the affidavit aver what the allegations of the complaint were. The provision of section 558, that implies that in certain cases the complaint need not accompany the order of arrest, does not apply to such a case as this, because the section is made subject to the provisions of section 557, which clearly directs that the affidavit must show that the conditions of subdivision 4 of section 549 exist.

The order appealed from should be reversed, with \$10 costs, and an order entered vacating the order of arrest, without costs.

O'GORMAN and INGRAHAM, JJ., concur.

Smadbeck v. Sisson.

SMADBECK, APPELLANT, v. SISSON AND ANOTHER,
RESPONDENTS.SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM,
DECEMBER, 1883 ; GENERAL TERM, JANUARY, 1884.

§ 636.

Attachment.—Where action was begun simultaneously with the completion of the work to recover payment for which it was brought, there is no breach of contract, and an attachment granted therein should be vacated.*

Where an attachment was granted upon an affidavit which stated that the defendant was indebted to the plaintiff in the sum of \$20,000 over and above all counter-claims for work labor and services performed intermediate, September 1, 1882 and the time of the commencement of the action and there was no proof of a demand or refusal to pay and no evidence from which the court could infer that the right of action was complete when the action was commenced: *Held*, that the defendant was entitled to the whole of the day on which the services were completed to pay therefor, [10] and the action was therefore prematurely brought ;[10] that there was no evidence of any breach of contract, [1, 4, 1] and the attachment was properly vacated.[3, 10]

Where an action was commenced simultaneously with the performance of the services for which it was brought and the only evidence of a breach of the contract to pay therefor was the plaintiff's own assertion of it: *Held*, that an attachment against the property of the defendant granted therein should be vacated.[3]

A mere recital of facts without a statement of their existence is not sufficient in an affidavit on which a warrant of attachment is applied for.[3, 4]

Smith v. Davis, (3 N. Y. Civ. Pro. 74) followed ;[4] Kiefer v. Webster (6 Hun. 526), distinguished.[3]

(Decided at Special Term, December 27, 1883, at General Term, January, 1884.)

* See Reilly v. Sisson, *post*, p. 361.

Smadbeck v. Sisson.

Motion at special term, by defendants, that an attachment issued against their property be vacated.

The opinion states the facts.

Stern & Myers, for the motion.

Morris Goodhart (*Charles Spiro*, attorney), opposed.

LAWRENCE, J.—The Code of Civil Procedure authorizes the granting of a warrant of attachment against the property of a defendant where the action is for the breach of a contract express or implied, other than a contract to marry, and the facts required by section 636 of the Code are shown to the satisfaction of the judge granting the same by affidavit (see *Code*, §§ 635, 636). It is objected in this case that the warrant was improperly issued, because no breach of contract is shown by the affidavit on which the warrant was granted. That affidavit states that "The defendants above named are justly and truly indebted unto this plaintiff in the sum of twenty thousand dollars lawful money of the United States, over and above all counter-claims known to this plaintiff, for damages for the breach of a contract express or implied, other than a contract to marry, founded upon the following facts, to wit: for work, labor and services done and performed, and caused to be done and performed by the plaintiff to and for said defendants, and at the special instance and request of the defendants, in consideration that the defendants had agreed and undertaken to pay to plaintiff therefor whatever said work, labor and services were reasonably worth, and which work, labor and services consisted in the examination, location and reporting on mines and mining property, located in Arizona, and in which the defendants claim to have an

Smadbeck v. Sisson.

interest, and in obtaining for the defendants' lands, vesting in them a lawful title and interest in certain mines and mining property in Arizona, and in work for them in his (plaintiff's) profession as a mining engineer; that said work, labor and services were reasonably worth the sum of \$20,000; that no part thereof has been paid, but that said sum of \$20,000 is justly due and owing from the defendants to the plaintiff over and above all counter claims known to him. Said work, labor and services were performed during a period from September 1st, 1882, in Arizona, to the time of the commencement of this action." The affidavit then sets out that the defendant Sisson resides in the State of California, and the defendant Shapely in Indiana. On the plaintiff's affidavit there is no fact stated showing that there has been a breach of the alleged contract between the plaintiff and the defendants. The defendants, according to the plaintiff, were to pay him for his services such sum as the same were reasonably worth, and while it is alleged by him that the same were reasonably worth the sum of \$20,000, that such sum has not been paid, and that it is due to the plaintiff over and above all counter-claims; it also appears from the affidavit that the work, labor and services were performed during a period from September 1, 1882, to the time of the commencement of this action. This does not seem to me to show that there was a breach of their contract on the part of the defendants. No demand is alleged to have been made upon the defendants, nor any refusal to pay after such demand. No fact is stated from which the court can see that there has been a breach of the contract. The affidavit literally read means that the suit was commenced simultaneously with the performance of the work, &c. The only evidence of the alleged breach is the plaintiff's own assertion of it. Be-

Smadbeck v. Sisson.

sides, the defendants, where no time is specified as to the performance of a contract, are entitled to a reasonable time within which to perform. If the affidavit of the plaintiff is true there was not an instant of time between the completion of the work and the commencement of the action. It has often been held that a mere recital of facts without a statement of their existence will not be sufficient in an affidavit on which

['] a warrant of attachment is applied for (see *Manton v. Poole*, 4 *Hun*, 638; *Pomeroy v. Ricketts*, 27 *Hun*, 245; *Smith v. Davis*, 3 *N. Y. Civ. Pro.* 74). In the last case, Justice DANIELS, in delivering the

['] opinion of the court, uses this language in speaking of the requisites of an affidavit upon which the issuing of an attachment is sought: "A plain case must be made out, and where it is not then it necessarily follows that the attachment must be set aside. This rule imposes no hardship upon the applicant for an attachment, for he is allowed to make out his case upon his own unsupported oath, and where the facts are such as will warrant him in making the statements required for this purpose, he should be obliged carefully and intelligently to embody them in the affidavit." Tested by these principles the affidavit of the plaintiff appears to be insufficient, and I am therefore of

['] the opinion that the motion to vacate the attachment should be granted. On the affidavits read upon the motion, I think that the weight of evidence is to the effect that Shapely is a resident of this state, but the result at which I have arrived on the other branch of the motion renders it unnecessary to definitely decide that question.

Motion granted, with costs.

From the order entered upon this decision an appeal was taken to the general term, which affirmed it, writing the opinions reported below.

Smadbeck v. Sisson.

P. J. Joachimsen & Morris Goodhart (Charles Spiro, attorney), for appellant.

A perfect contract to perform work, labor and services, and to pay for the same what they are reasonably worth is stated, unless there be interpolated into it a condition as to time, place or demand of payment. This breach is the relevant point of substantial non-compliance, and not in the irrelevant point of a formal difference. An indebtedness being established, the non-payment is the breach. It is the duty of the debtor to seek his creditor and make payment. This duty attaches as soon as the indebtedness is incurred. It does not appear that the work was done upon time or credit. If by the contract itself there is not any modification (of which there is no pretense in this case) then the duty of the defendant to pay attaches, and, being unperformed, the cause of action is perfect, and the right to begin action thereon is immediate, and not subject to limitation or delay for the convenience of the debtor. See *Wheeler v. Warner*, 47 *N. Y.* 519 The judge admitted in his opinion the allegations of a breach, but complains that only plaintiff made it. This is unreasonable—surely no third party could allege the breach as well as the plaintiff could. His own allegation of a breach was sufficient, for it may be that he alone is cognizant of that fact. None of the allegations in plaintiff's affidavits are denied, and they must, therefore, be taken as true, for the purposes of the motion. Being true, the plaintiff had sufficiently shown a breach of a contract. The allegation of a breach of contract is in the exact words laid down by Mr. Chitty in his work on Pleadings (see 2 *Chitty Pl.* 38, 77).

Stern & Myers, for respondents.

To confer jurisdiction upon the court, the affidavit must clearly disclose a cause of action in favor of the

Smadbeck v. Sisson.

plaintiff for a breach of contract (*Code Civ. Pro.* § 636, *subd.* 1.)

This provision of the Code is imperative. The right of action must appear to a certainty (*Pomeroy v. Ricketts*, 27 *Hun*, 242; affirmed 91 *N. Y.* 668; *Smith v. Davis*, 3 *N. Y. Civ. Pro.* 74; *Campbell v. Proprietors, &c.*, 18 *How. Pr.* 412; *Skiff v. Stewart*, 39 *How. Pr.* 385; *Jacobs v. Hogan*, 85 *N. Y.* 243.)

A mere allegation that a cause of action exists in favor of the plaintiff, following the words of the Code, is not sufficient. Such an allegation is simply a conclusion of law. The affidavit must *show* a cause of action by stating facts. *Code Civ. Proc.* § 636; *Skiff v. Stewart* (*supra*); *Manton v. Poole*, 4 *Hun*, 638. The law permits the plaintiff upon his *ex parte* statement of a cause of action to impound the property of the non-resident until judgment. It is, therefore, but just that the plaintiff should be required to show his right of action clearly and unequivocally (*Pomeroy v. Ricketts, supra*).

To constitute a breach of the defendants' contract in this case, there must be, 1st, actual or presumptive notice to defendants of the completion of plaintiff's services, with his claim for compensation; and, 2d, the lapse of a reasonable time for payment, or the adjustment of the "reasonable value" of the services (2 *Story Cont.* § 970; 2 *Parsons Cont.* 660). What is "a reasonable time" is a question of law (2 *Wail's Actions and Def.* 403, and cases cited).

BRADY, J.—The learned judge in the court below vacated the attachment granted in this case upon the ground that a cause of action was not clearly made out by the affidavit of which the attachment was predicate. The statement in the affidavit of the plaintiff is that the defendants were indebted to him in a sum of money mentioned over and above all counter-claims, and upon

Smadbeck v. Sisson.

facts which he recited, namely, for work, labor and services done and performed and caused to be done and performed by and for the defendants at their special instance and request, in consideration that they undertook to pay what the services were reasonably worth, and then stated of what the services consisted. He further alleged that the work and services thus indicated were reasonably worth the sum of \$20,000; that no part of it had been paid, and that the sum which they were reasonably worth was still due and owing from the defendants to the plaintiff over and above all counter-claims. Then follows a statement that the said work, labor and services were performed during a period from September 1, 1882, to the time of the commencement of this action, so that the action was commenced at the time the services were complete.

It would appear from this statement that on the very day that the services were completed, and all the obligations on the part of the plaintiff performed, the action was commenced. There is no statement of any notification to the defendants that the services ['] were completed; no evidence of any demand having been made; no proof of any refusal to pay, and no statement of any fact from which the court could draw the inference that in this regard the right of action was complete on the day when the action was commenced.

This element of the case was one of great importance in the consideration of the propriety of granting the attachment. It is discussed in an elaborate opinion by the justice in the court below, who arrived at ['] the conclusion that there was no evidence of any breach of the contract, that there was no demand, and that there was no refusal to pay; therefore, that there was no fact stated from which the court could say there was a breach of the contract; that the affidavit, literally read, meant that the suit was commenced

Smadbeck v. Sison.

simultaneously with the performance of the work, and that the only evidence of the breach was the plaintiff's own assertion. And the judge further remarked that if the affidavit of the plaintiff was true, there was not an instant of time between the completion of the work and the commencement of the action.

The case of *Kiefer v. Webster* (6 *Hun*, 526) is not in conflict with these views, because the allegation ['] in that case was that the defendants were indebted to the plaintiffs in a sum named, for goods sold and delivered, for which they had promised to pay, but failed to do.

We think the disposition of the application ['] was a proper one, and that the attachment should have been vacated as it was.

The order appealed from is therefore affirmed, with \$10 costs and the disbursements of the appeal.

DANIELS, J.—[Concurring.]—The defendants were entitled to the whole of the day in which the services were completed to pay for their performance. The action was therefore prematurely commenced, and the attachment was properly set aside.

Reilly v. Sisson.

REILLY, APPELLANT, v. SISSON, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
JANUARY, 1884.

§ 636.

Attachment.—Where the affidavit on which an attachment was granted alleged that the money which the action was brought to recover, was loaned between a date named and the time of the commencement of the action, and there was no allegation of demand therefor, held that the attachment should be vacated.*

Where the affidavit on which an attachment was granted alleged that the defendant was indebted to the plaintiff in the sum of \$6,000 over and above all counterclaims for damages for a breach of a contract express or implied, other than a contract to marry, and that such indebtedness arose as follows: viz., that at sundry times since April 1, 1883, up to and including the day upon which the action was commenced, the plaintiff at the special instance and request of the defendant loaned and advanced to him sums of money amounting in all to \$6,000, which he promised and agreed to repay but no part of which has been paid, and it did not appear when the money was to be repaid or that there had been any demand for it. *Held*, on appeal from an order vacating the attachment, that a breach of contract was not shown [¹, ⁴] and the attachment was properly vacated. [⁵]

Pomeroy v. Ricketts (37 Hun, 242); [²] Smith v. Davis (3 N. Y. Civ. Pro. 74); followed. [³] Kiefer v. Webster (6 Hun, 526) distinguished. [⁴]

(Decided January, 1884.)

Appeal from order vacating attachment, issued against the property of the defendant.

The attachment was granted upon an affidavit the substance of which is stated in the opinion. The defendant moved to vacate it upon the ground that the

* See Smadbeck v. Sisson, *ante*, p. 358.

Reilly v. Sisson.

affidavit on which it was granted was insufficient. The motion was granted and this appeal taken from the order thereupon entered.

In granting the motion the special term judge wrote the following opinion.

LAWRENCE, J.—The affidavit on which this attachment was issued seems to me to be subject to the criticisms which was made by the general term of this department, in *Smith v. Davis*, 3 *N. Y. Civ. Pro.* 74; see also *Pomeroy v. Ricketts*, 27 *Hun*, 242. Again if the affidavit is true, a portion of the loan was made on the day the attachment was issued; therefore I do not think that a breach of the alleged contract was shown.

See my opinion in *Smadbeck v. Sisson*,* filed this day. See also, generally as to the particularity required in stating the plaintiff's claim on an application for an attachment. *Skiff v. Stewart*, 39 *How. Pr.* 385; *Ruppert v. Haug*, 1 *N. Y. Civ. Pro.* 411.

The motion to vacate the attachment will be granted with \$10 costs.

P. J. Joachimsen and Morris Goodhart, for appellant.

Stern & Myers, for respondent.

BRADY, J.—The plaintiff in this case, in the affidavit on which the attachment was granted, alleges that the defendant was indebted to him in the just and full sum of \$6,000 over and above all counter-claims for damages for a breach of a contract, express or implied, other than a contract to marry, and that such indebtedness arises upon the facts stated. And the facts are these: That at sundry times since April 1, 1883, up to

* See *ante*, p. 353.

Reilly v. Sisson.

and including this date—namely, the fifth day of November, 1883, upon which day the attachment was granted—the plaintiff at the special instance and request of the defendant, loaned and advanced to him sums of money amounting in all to the sum of \$6,000, which he promised and agreed to repay, but no part of which has been repaid.

It will appear, therefore, from the affidavit that on the very day when some portion of the money was loaned to him, namely, November 5, 1883, when the affidavit was made, he had loaned and advanced money to him. As to what arrangement was made with regard to the repayment of the money, whether it was to be repaid instantly or at some time in the future agreed upon by the parties, whether any notification to repay the money so alleged to be advanced to the defendant was given him, and whether he had any information at all on the subject, is not alleged. Nor is it stated that any demand was made upon him on the date that the suit was commenced for the money which is asserted to have been loaned and advanced. There is, in other words, nothing to show that, as to the money ['] at least that was advanced upon the day that the attachment was granted, there was any breach of the contract to pay. It is not reasonable to suppose that the money advanced upon November 5, was to be paid on November 5, in the absence of any allegation to the contrary. The learned judge, in the court below, therefore, regarded the affidavit as one which was subject to the criticism made upon the affidavit in the case of *Smith v. Davis* (3 *N. Y. Civ. Pro.* 74), and *Pomeroy v. Ricketts* (27 *Hun*, 242), and this was a correct view of the subject.

In the case of *Pomeroy v. Ricketts* (*supra*) the ['] court said that it was indispensable to show that a cause of action existed before the right to an attachment could be made to appear, and that no hardship

Reilly v. Sisson.

was imposed upon the plaintiff, who was allowed to prove this fact by his own affidavit, in requiring that it should be made out with a reasonable degree of clearness, and that the plaintiff must certainly be required to show that he has a demand, upon which the defendant has become legally liable for the recovery of judgment against him, before a cause of action could be made to appear. And in the case of *Smith v. Davis* (*supra*) ['] the court said: "To entitle the party to make such a seizure under an attachment before his right to appropriate the defendant's property has been established by evidence, reasonable and satisfactory proof is required. A plain case must be made out, and where it is not, then it necessarily follows that the attachment must be set aside." And the learned judge in the court below said that if the affidavit was true upon which the attachment was granted, a portion of the loan was made on the day the attachment was issued. He might have added that not only was the loan made upon that day, but the money advanced, because as we have seen, the language of the affidavit is that at sundry times from April 1, 1883, up to and including November 5, which was the date of the affidavit, the plaintiff loaned and advanced to the defendant cash. And the learned justice also said: "Therefore I do not think that a breach of the alleged contract was shown."

The case of *Kiefer v. Webster* (6 *Hun*, 526) ['] seems to be, but is not, in conflict with these views, because the allegation in that case was that the defendants were indebted to the plaintiffs in a sum named for goods sold and delivered, for which they had promised to pay but failed to do so. The time of the delivery is not stated, and it may be assumed that the promise was made after the delivery on demand. In reference to that case it must also be said the rule adopted was very liberal and should not be

Barclay v. Culver.

extended, particularly since the subsequent cases, to which reference has been made have weakened its authority. It must be confined to cases, if it be held yet to be controlling, of a precisely similar character.

For these reasons it is thought that the judge in ['] the court below was right in the disposition he made of the application to vacate the attachment, that the attachment should not be held, and that on the contrary it should have been vacated as it was. The order appealed from is therefore affirmed, with \$10 costs and the disbursements of the appeal.

DANIELS, J., concurred.

BARCLAY v. CULVER.

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM,
FEBRUARY, 1884.

§ 3253.

Extra allowance.—Computed on amount involved in the action.

Where an action was brought to recover \$2,500 and interest, and the defendant interposed as a defense a set off amounting to \$7,996, and the plaintiff recovered the full amount claimed by her, and the court granted her an extra allowance of five per cent.,—*Held*, that plaintiff's allowance should be computed upon both her claim and the set off; that the amount of the alleged set off was directly involved in the case.

(Decided February 11, 1884.)

Motion for a new taxation of costs.

This action was brought by plaintiff, to whom the claim in suit had been assigned, to recover of defendant

Barclay v. Culver.

the sum of \$2,500 and interest. Defendant interposed as a defense and by way of set-off two notes which with interest were of the aggregate value of \$7,996. Upon the trial, judgment was rendered for plaintiff upon all the issues involved, and for the full amount claimed by her with interest. The court granted an allowance of five per cent. Plaintiff upon the taxation of costs by the clerk claimed that the percentage allowed should be calculated upon the plaintiff's recovery and upon the amounts pleaded as set off by defendant as these constituted "the value of the subject matter involved." The clerk refused to tax an allowance on the set-offs and taxed it only on plaintiff's claim. This motion is to review such taxation.

William King Hall (Hall & Blandy, attorneys), for plaintiff cited: Woonsocket Rubber Co. v. Rubber Clothing Co., 1 N. Y. Civ. Pro. 350, citing cases; Williams v. Western Union Telegraph Co., 61 How. Pr. 305; Conaughty v. Saratoga County Bank, 92 N. Y. 401.

Henry L. Betts, (Culver & Betts, attorneys), for defendant, cited: People v. N. Y. and Staten Island Ferry Co., 68 N. Y. 71-83; Ogdensburg and Lake Champlain R. R. Co. v. Vermont and Canada R. R. Co., 73 N. Y. 176.

LAWRENCE, J.—I think that the plaintiff is entitled to the full allowance which she claimed on the taxation. The amount of the alleged set-off was, I think, directly involved in the case. *Woonsocket Rubber Co. v. Rubber Clothing Co., 1 N. Y. Civ. Pro. 350; Vilmar v. Schall, 61 N. Y. 564.*

Bell v. Lesbini.

BELL v. LESBINI.

CITY COURT OF NEW YORK, SPECIAL TERM, JANUARY, 1884.

§§ 495, 501.

Counter-claim.—In action on contract, a counter-claim founded in tort and not arising out of the facts stated in the complaint cannot be set up.

Where an action was to recover a balance for board and lodging furnished by the plaintiff to the defendant from June 23, to October 23, 1883, and the defendant set up a counter-claim in his answer for damages for the conversion of certain personal property belonging to him, alleging that October 23, 1883, the plaintiff ejected him from the room in her house occupied by him, and took therefrom the said personal property, and converted it to her own use,—*Held*, that as the action was founded *ex contractu*, and the counter-claim *ex delicto*, and as the counter-claim did not arise out of the transaction mentioned in the complaint, a demurrer to the counter-claim on the ground that it was not of the character specified in section 501 of the Code of Civil Procedure, should be sustained, that the counter-claim was not of such nature as to permit the defendant to waive the tort and recover as upon an implied contract.

In an action on the contract, a cause of action founded in tort, and not arising out of the transaction mentioned in the complaint cannot be set up as a counter-claim.

Coit v. Stewart (12 Abb. N. S. 216), distinguished.
(Decided January 31, 1884.)

Demurrer to counter-claim.

The facts are stated in the opinion.

George L. Sterling, for demurrer.

Sidney H. Stuart, opposed.

BROWNE, J.—Section 501 allows a counter-claim arising out of the contract or transaction set forth in the

Bel v. Lesbini.

complaint as the foundation of the plaintiff's claim or connected with the subject of the action. The contract set forth in the complaint is alleged to have been made between plaintiff and defendant, whereby plaintiff agreed to furnish defendant with board and lodging at her house at the rate of \$30 per week. The complaint alleges that he agreed to pay that sum therefor; that she furnished said board and lodging to the defendant from June 23, 1883, to October 23, 1883; that under the agreement in question there became due to her \$525.75; that the defendant paid on account thereof \$262, leaving a balance due of \$263.75, to recover which the action is brought. The allegation of the answer demurred to, and which is set up as a separate defense and as a counter-claim to the cause of action, is that on October 23, 1883, the defendant was the owner and possessed of certain personal property of the value of \$1,000. That on said day plaintiff forcibly ejected defendant from the room mentioned in the complaint; took possession of said personal property and converted the same to her own use; and that by reason of said acts he has been damaged in the said sum of \$1,000. Thus the action is founded *ex contractu*, while the counter-claim is founded *ex delicto*. The demurrer is taken under the 4th subdivision of section 495 of the Code of Civil Procedure, on the ground that the counter-claim is not of the character specified in 501 of the Code.

I think the demurrer is well taken. The subject matter of the counter-claim is the tortious act of the plaintiff in wrongfully taking and converting to her own use the property of the defendant of the value of \$1,000. While the plaintiff, on the other hand, sets forth an express contract, upon which a fixed and certain sum was due to her, and which she was entitled to receive on the 23d day of October, 1883, the pleadings do not suggest anything connected with that particu-

Bell v. Lesbini.

lar transaction which was open, undetermined or to be done before the plaintiff was entitled to receive the money claimed to be due from the defendant. There is no claim or suggestion anywhere that defendant was entitled to remain longer in the premises nor that plaintiff had not the right to the possession of her rooms upon that day, nor the right to refuse to continue furnishing defendant with board and lodging.

I have been unable to find a single case in which a clear case of tort, not arising out of the transaction mentioned in the complaint, has been allowed to stand in opposition to a recovery upon a contract. That it cannot be so set up has been decided in several cases (see *Piser v. Stearns*, 1 *Hill*. 86; *Chambers v. Lewis*, 11 *Abb. Pr.* 210). There are some cases in which the doctrine might be said to be allowed to prevail to the extent of permitting a party to waive the tort and recover upon an implied contract. An examination of those cases will disclose the fact that there existed a conventional relation between the parties: *e. g.*, as an agent who collects money for his principal and refuses to pay over (*Coit v. Stewart*, 12 *Abb. N. S.* 216). That the counter-claim is purely to recover for the value of the property converted, is not open to dispute. It cannot have relation to the rooms and board, and no part of the sum is claimed to be for damages for the ejectment from the rooms. As before stated, he does not claim he had a right to the possession thereof upon or beyond the day mentioned.

The sum claimed being simply for the value of the property converted, the demurrer is sustained.

Snyder v. Sayder.

SNYDER, APPELLANT v. SNYDER AND ANOTHER, AS
EXECUTORS, ETC., RESPONDENTS.

SUPREME COURT, THIRD DEPARTMENT, GENERAL TERM,
MAY, 1883.

§§ 2739, 2740.

*Executor—Claim in favor of, against his intestate's estate can be paid only
upon allowance by surrogate.—Assignee of executor cannot
maintain action on such claim.*

Where in an action by one E. S., the wife of P. R. S., to recover from said P. R. S. and one S. S. as the executors of their father W. S. for services rendered in boarding and nursing said W. S. subsequent to August 4, 1874, it appeared that the defendant P. R. S. prior to August 4, 1874, furnished the board, &c., of W. S. and was paid therefor; that in January, 1874, W. S. agreed in writing, to pay P. R. S. for the services of himself and family (which included plaintiff) in taking care of him; that thereafter and until his death he continued to live in the house occupied by P. R. S., the same as before, P. R. S. and his family, including the plaintiff, continuing to care for him in the same manner, giving him, of course, increased attention as he became more infirm; that the house and farm occupied by P. R. S. during all this time, belonged to W. S. who was paid no rent therefor; that P. R. S. supplied the provisions and necessities of life for the family and the labor of his two sons and daughter in the care of W. S., and that he had assigned all his claim against the estate of W. S., to the plaintiff, and the only evidence tending to show that plaintiff's services were separate and distinct from those rendered by P. R. S., was the testimony of P. R. S., his two sons and daughter, that he had heard W. S. say that he would pay plaintiff at a certain rate, which was the same as that mentioned in his agreement with P. R. S.: *Held*, that the referee before whom the cause was tried erred in his findings of fact, so far as they implied that there was any contract between the deceased and plaintiff; ['] and the findings should be reversed so that it shall be found that the services were not rendered by the plaintiff on her own account, but on account of P. R. S., and that the indebtedness did not accrue to her: ['] also *Held*, that plaintiff

Snyder v. Snyder.

could not maintain an action on the claim assigned to her by P. R. S., he being one of the executors.

An executor having a claim against the estate of his testator for board and attendance furnished him, cannot assign that claim to a third person, and thus authorize such third person to sue the executor or the executors.^[10]

A claim of an executor against his intestates estate can only become effective upon allowance by the surrogate,^[7, 10] and his assignee does not stand in any better position.^[3, 4]

Decker v. Decker (2 *Paige*, 149); ^[1] Smith v. Lawrence [11 *Paige*, 207]; ^[2] Sanford v. Sanford (45 *N. Y.* 723); ^[7] Warts v. Jenkins (11 *Barb.* 546); ^[1] McGregor v. McGregor (35 *N. Y.* 218), ^[1] distinguished.

(Decided July, 1883.)

Appeal by plaintiff from judgment entered on report of referee.

The plaintiff, Elizabeth Snyder, is the wife of Philip R. Snyder, one of the defendants. She brings this action against Philip and Sylvester Snyder, as executors, etc., of William Snyder, deceased, who was their father, to recover for services rendered William Snyder during his lifetime.

On the trial of the action, the plaintiff called as a witness the defendant, Philip Snyder, who, under the objection of the defendant Sylvester Snyder, proved the care which his wife and daughter took of his father. He also testified under cross-examination that he took the care of his father nine-tenths of the time, that sometimes his sons helped, sometimes his wife and daughter, and that they all lived together.

He further testified that he assigned his claim to his wife after his father's death. The plaintiff testified, under objection, that William Snyder was sick in 1874, 1875, 1876, 1878, and put in evidence a written assignment, dated February 19, 1879, assigning to George Barber an agreement made by William Snyder, January 17, 1874, agreeing to pay for services of Philip

Snyder v. Snyder.

Snyder and his family, in taking care of him ; and all moneys on the agreement and all claims and demands against William or his estate due for board, care and services rendered by Philip Snyder and his family in taking care of him.

Also an assignment of the same date from Barber to plaintiff, of all the said agreement made by William, dated January 17, 1874, and all claims and demands which were assigned to Barber by Philip Snyder.

Defendant then moved to strike out the evidence of Philip Snyder, as it then appeared that he was assignor to plaintiff. This was granted as to personal transactions and communications with deceased.

The claim of the plaintiff was for services from August 7, 1874, to the death of testator, December 4, 1878.

The referee found that during all this time Philip Snyder provided for the family and for the boarding of the deceased and the plaintiff and his two sons and daughter, and supported the house, and that plaintiff performed and discharged the duties of wife, mother and housekeeper ; that the extraordinary care required by the deceased in his sickness was rendered by Philip Snyder, the plaintiff, his two sons and his daughter, the most arduous part by the plaintiff.

The referee found that prior to this action the defendant, Philip Snyder assigned to plaintiff (through Barber) the agreement aforesaid and all his claims for compensation and services of himself and family. That several times since 1874, and prior to his last sickness, the deceased promised to pay plaintiff, for his board, when in usual health \$4 per week, and from \$1 to \$7 per day when sick, according to the services required ; that plaintiff had no separate estate and carried on no separate business.

He also found that from 1864 to August, 1874, the

Snyder v. Snyder.

deceased boarded with Philip Snyder, and Philip Snyder furnished board, washing and lodging to him at \$4 per week, for which the deceased settled with him August 4, 1874.

J. L. Baker, for appellant.

Merritt King, for respondent.

LEARNED, J.—We think that there is no sufficient evidence that there was any contract made with the plaintiff by William Snyder. The facts are against any such theory. In the first place, down to August 4, 1874, it is undisputed that the board, etc., were furnished by Philip Snyder, and he was paid therefor. Next the written contract of January 17, 1874, is an agreement to pay Philip for the services of himself and family (which included the plaintiff), in taking care of William. Again, there is no reason for any change in this respect after August 4, 1874. William continued to live in Philip's house, that is, in the house which Philip occupied, the same as before. Philip and his family, including the plaintiff, continued to care for him in the same manner, although, of course, giving him increased attention, as he became more infirm. Philip, all this time, had the use of the farm, that is from 1864 down to the time of trial, without paying any rent. Or, as Philip says: "I have not paid him a dollar for the use of the land, but have in services, in taking care of him." This was a farm of 75 acres after Philip had bought 23 acres from William. And Philip says his father gave him a deed of one-fifth of the 75 acres and of 12 acres for taking care of him, and gave him also the stock and sheep. As a matter of fact, too, during all this time, Philip supplied the provisions and necessities of life, and without dispute the

Snyder v. Snyder.

labor of his two sons and daughter in the care of his father.

It is not credible that there was a bargain by which the labor of the plaintiff was to be separated out, and performed on her own account. Nor is there any evidence to justify a finding that the plaintiff was to be paid for the provisions which Philip furnished, and for the labor and services of Philip and of his sons and daughter. Yet if one construction urged by the plaintiff is to be followed, she was to be compensated, not for her own labor alone, but for that of her husband, his sons and his daughter, and for the provisions and necessities he furnished ; because the alleged promise to plaintiff was to pay \$4 per week and extra when sick. And it is not pretended that this amount does not cover all that William received from Philip and his whole family.

There is no need of any such unreasonable construction. The testimony given, that the testator promised to pay plaintiff so much, is easily understood. It was a statement of the amount to be paid, not of the person to whom the amount was to be paid. The husband and wife were living together, both taking care, as was right, of the infirm father. There was no special intent to pay the wife. And this is very evident from the circumstance that by giving the husband the use of the farm the father was all the time paying him for these very services ; or at least paying him in part. No one can fail to see that the use of the farm was, to the extent of its value, to pay for the care the old man needed. And that use was all the time going to Philip.

Furthermore, the assignment by Philip to Barber, and through him to the plaintiff, is additional evidence, if any were needed, that neither the plaintiff nor Philip considered that the claim for these services was hers in any other way than by assignment from him.

Against all these circumstances, we have merely

Snyder v. Snyder.

the testimony of Philip, of his two sons and his daughter, that they heard the old man say he would give the plaintiff \$4 per week and extras as above stated. Testimony to such conversations are of little weight, under such circumstances, against the undisputed facts. The daughter even testifies on cross-examination, "he told my *father* and *mother* he would give *them* so much for taking care of him."

The referee finds that Philip assented to the arrangement made by the plaintiff. But he seems to rest that finding upon the assignment by Philip to the plaintiff, through Barber. And this assignment is on the contrary a repudiation of any such arrangement. For if the debt was contracted with plaintiff, Philip had nothing to assign.

We are of opinion therefore that the referee ['] erred in his findings of fact, so far as they imply that there was any contract with the plaintiff.

Another very important question arises, upon which unfortunately this court disagreed when the case was here before;* and that respects plaintiff's claim as assignee of Philip. The question is whether an executor, having a simple claim against the estate on contract, can assign that claim to a third person and thus authorize such third person to sue the executor or the executors. The defendant insists that any claim of an executor can be collected only by its being allowed by the Surrogate. *Laws* 1837, ch. 460, §§ 33, 37; *Code*, §§ 2739, 2740.

As is well known, the executor could formerly retain property in satisfaction of his claim. Roger ['] v. Hosach, 18 *Wend.* 319. Now that right has been taken away, and the debt must be allowed by the surrogate.

It would hardly be claimed that, if there were a sole

* This decision has not been reported.

Sayder v. Snyder.

executor, he could assign a claim which he had against the testator, and permit himself to be sued thereon, or at least that suit would protect him on his accounting.

If there are two executors and one has the assets in his hands and claims a debt to be due to him he cannot retain it, and an action against the other would be useless. If one had the assets and the other had none, and if the latter claimed a debt to be due to him, the former cannot pay, because the money paid would still be assets, which the latter could not retain until his debt was proved before the surrogate. The delivery of assets by one executor to the other does not even discharge the former. *Mesick v. Mesick*, 7 *Barb.* 120. The claim of the executor can only become effective upon allowance by the surrogate (*Kearney v. McKeon*, 85 *N. Y.* 136). And it is difficult to see why the assignee of an executor should stand in any better position than the executor himself. These are evident ['] reasons why it would be dangerous to permit an executor to give, by assignment, a right of action at law upon a claim held by him against the estate.

The provisions of the Revised Statutes on this subject were intended to compel an executor to prove his ['] claim before the surrogate on notice to the persons interested. Suppose he assigns his claim, allows himself to be sued and a judgment to be recovered against him, what would be the effect? If the judgment is to be of any use at all, then it can no longer be necessary to prove the debt before the surrogate, and those interested are deprived of the opportunity given by statute.

It is claimed by the plaintiff that the court of chancery had (and therefore that this court has), jurisdiction of controversies between executors in regard to claims of the estate. And some cases are cited in support of this view. *Decker v. Decker* (2 *Paige*, 149)

['] was the case of a bill filed by two executors against a co-executor, to compel the payment of a bond

Snyder v. Snyder.

given by them to the testator. The defendant claimed the right to retain in preference to other bond creditors. That was before the Revised Statutes. *Smith v.*

Lawrence (11 *Paige*, 207), was an appeal from a ['] surrogate's order and not a case of original jurisdiction. *Sanford v. Sanford* (45 *N. Y.* 723), was an action at common law on a note. The plaintiff claimed

to be the owner in her own right and the defendant ['] insisted she was not. *Warts v. Jenkins* (11 *Barb.* 546), held that an action may be maintained by

['] executors against their co-executors to compel him to pay a debt which he owed the estate, necessary to pay a sum decided to be due them for moneys paid on account of the estate. *McGregor v.*

McGregor (35 *N. Y.* 218), was the revival of a fore- ['] closure action by one executor against the mortgagor co-executor.

Thus not one of these cases shows that an executor, having a claim against the estate, may bring an action therefor against his co-executor. It is undoubtedly unsafe to lay down an absolute rule that this court has no jurisdiction of this class of actions. Peculiar circumstances may arise when jurisdiction should be taken.

But take this simple case, and I think Philip ['] should not be allowed to maintain an action against Sylvester, or against Sylvester and himself jointly. If Sylvester had voluntarily paid this claim to Philip, would not Philip have been obliged to account for the money so paid, as assets? That is, before he could retain that money, he must have proved his claim before the surrogate. And if this be true of a voluntary payment, it is necessarily true of a payment under a judgment, to which only the two executors are parties.

The character of the fund, whether in the hands of one executor or of the other, cannot be changed until a decree of the surrogate is had.

Bank of Oswego v. Dun.

The finding of fact then must be reversed so that it shall be found that the services were not rendered ["] by the plaintiff on her own account, but on account of Philip, and the indebtedness did not accrue to her. And the judgment must be affirmed with costs without prejudice to the presentation of any claim by Philip on his accounting.

BOARDMAN and BOCKES, JJ., concurred.

FIRST NATIONAL BANK OF OSWEGO, Respondent, v. DUN AND ANOTHER.

SECOND NATIONAL BANK OF OSWEGO, Appellant, v. DUN.

SUPREME COURT, FOURTH DEPARTMENT; GENERAL TERM, JANUARY, 1883.

§§ 1694, *et seq.*

Replevin.— When property replevied is not in the custody of the law so as to prevent levy therein under an execution.— Undertaking given on replevying personal property does not in any manner secure or protect judgment debtor of defendant in replevin action.*

Where one D. being insolvent, made a general assignment to one J.D. Jr. of all his property including a malt house containing from eighteen thousand to twenty thousand bushels of malt in bulk, and the First National Bank, claiming to own ten thousand bushels of the malt, brought an action against D. and J.D., Jr., to recover the same, and issued replevin process to the sheriff who took possession of the malt, held it the time required by law, and then went

* See Second National Bank of Oswego v. Dun, 2 N. Y. Civ. Pro. 259.

Bank of Oswego v. Dun.

to the president of the First National Bank and told him that he came to deliver the malt and did deliver it, and the president accepted the delivery, but requested the sheriff to separate ten thousand bushels and deliver it at a designated place, which he agreed to do, and thereafter and before said malt had been so separated and delivered, the Second National Bank issued an execution to the sheriff on a judgment recovered by it against D. and directed him to levy upon the malt which, being indemnified by it, he did,—*Held*, that an order, made on the application of the First National Bank, vacating the levy and enjoining the sheriff from proceeding thereunder, was improperly granted and should be reversed [4]; that the Second National Bank being a stranger to the replevin proceedings, the property was not in legal custody as to it so that it could not be reached by levy under the execution. [5]

The undertaking given in a replevin action providing for the return of the property to the defendant in that action if its return should be adjudged, does not run to a judgment creditor of the defendant, nor in any manner secure or protect his rights or interest in the property. [1]

Hayne v. Lucas (10 *Peter U. S.* 400); [2] Seymore v. Newton (17 *Hun*, 32); [3] Gilbert v. Moody (17 *Wend.* 856); [4] Morris v. White (5 *Wend.* 71), [5] distinguished.

(Decided April, 1883.)

Appeal from an order staying proceedings upon an execution issued by the Second National Bank against the property of John Dun, and setting aside a levy made by the sheriff of Oswego county in virtue of such execution.

On the 7th day of January, 1882, John Dun made a general assignment for the benefit of his creditors, to John Dorsey, Jr., his book-keeper and clerk, who took possession of the assigned property, consisting among other things of a malt house, in which were from eighteen thousand to twenty thousand bushels of malt in bulk. Two days later, viz., January 9, 1882, the First National Bank brought replevin for ten thousand bushels of said malt against Dun and Dorsey, and upon the mandate in that action the sheriff of Oswego

Bank of Oswego v. Dun.

seized the ten thousand bushels of malt and kept possession of it until the 13th of January, 1882, when (as no bond had been given by the defendants and time therefore had expired), the sheriff went to the president of the First National Bank, at his banking rooms, and told him he had come to deliver the malt named in the replevin papers, and that he did then and there deliver it, though it had not been separated or removed from the other portions of the eighteen thousand to twenty thousand bushels in the malt house.

The president accepted it, and requested the sheriff to separate the ten thousand bushels, and to deliver it to a designated place, and the sheriff undertook to comply with that request, apparently as the agent of the First National Bank.

On the 13th of January, 1882, the Second National Bank duly recovered a judgment against John Dun, upon a debt held by it, for \$15,415.23, besides costs, and forthwith issued an execution to the coroner, which was afterwards withdrawn, and one was issued on said judgment, and delivered to the sheriff of Oswego county who upon request of the plaintiff therein at once levied on the malt in question, and other property of the assignor and judgment debtor. On the 17th of January, 1882, the First National Bank indemnified the sheriff against the claim of the Second National Bank.

S. C. Huntington, for appellants.

Charles Rhodes (Rhodes & Richardson, attorneys),
for respondents.

HARDIN, J.—Both banks claim title to, or an interest in ten thousand bushels of malt, through Dun, who on the 7th January, 1882, was in possession thereof. Upon the title or interest of the plaintiff the First Na-

Bank of Oswego v. Dun.

tional Bank on the 9th of January, two days after the execution of a general assignment, for the benefit of creditors, by Dun to Dorsey, it commenced an action of replevin, and claimed the delivery of the malt. It is insisted in the argument of the appellant that the First National Bank cannot maintain any interest in or title to the malt, as against the judgment and execution of the Second National Bank, because the warehouse receipts held by the First National Bank were executed by Dun, the owner, and that by the principle laid down in *Farmers & Merchants' Bank of Buffalo v. Lang* (87 *N. Y.* 214), the same are ineffectual except by way of a mortgage on the part of Dun, and that not having been filed, they cannot operate to prevent a judgment creditor from levying upon and selling the malt. We need not pass upon that question at this time, and indeed we cannot properly, as the facts upon which the question will ultimately turn, are not now fully before us.

Suffice it to say, that we see sufficient in the position taken in behalf of the Second National Bank, to induce us to suppose that its levy upon the malt was made for the purpose of attempting in diligence and vigilant use of remedies, to prosecute a supposed legal right. It may also be observed in passing, that the affidavits before us suggest proper grounds upon which the Second National Bank seeks to avoid the assignment to Dorsey, and that the questions relating to such an attack, were proper for the more solemn mode of investigation found in a trial, rather than in the summary modes, which attend the ordinary Special Term motions. *Knapp v. Fowler*, 26 *Hun*, 202.

If therefore the assignment was invalid, and the interest of the First National Bank in the malt depended upon the warehouse receipts for its validity, the Second National Bank with its judgment and execution was in a situation to seize the malt as the property of Dun, and to make its execution out of the

Bank of Oswego v. Dun.

same, unless some technical rule of law prevented the sheriff holding the execution from following the command of the execution and the directions of the judgment creditor in respect thereto.

Appellants' contention is that the "property taken under replevin either before or after surrender to the plaintiff in the replevin action, cannot be taken from such plaintiff or the sheriff on execution against one of the defendants in the replevin suit." In considering that question we must, upon the facts presented to us, take notice of the fact that more than three days had elapsed from the service of the replevin papers before the execution was levied. The right of the defendants in the replevin action to give an undertaking, and have the property returned to them, had expired. The sheriff was not therefore obliged to retain the property in his possession, in virtue of the requisition papers of the replevin. It had already become his duty to make a manual physical delivery of the malt to the plaintiff in the replevin action. (Code of Civil Procedure, §§ 1702 and 1703.)

He had recognized that duty, and in obedience to it, he had called upon the proper officer of the plaintiff in that action, and proposed a delivery of the property, and the affidavits used upon the motion contained a statement that the officer had accepted such delivery as was proffered by the sheriff. However, it appears that the malt remained in the store-house of the debtor until after the sheriff received the execution—that there was, *in fact*, a loss upon the malt, is shown by the affidavits. But it said that the sheriff had received the usual undertaking from the plaintiff in the replevin action, providing for the return of the property to the defendant in that action if its return should be adjudged. But it must be borne in ['] mind, that such an undertaking did not run to the Second National Bank, nor in any manner

Bank of Oswego v. Dun.

secure or protect its rights or interests in the property. Nor was the position of the Second National Bank in subordination to or in harmony with the interest or title asserted by the First National Bank.

It was in hostility to the interest or title sought to be established through the proceedings in replevin, asserting that Dun had never, as against a judgment creditor, parted with the possession and title to the property, and that the same was therefore liable to levy and sale upon an execution against him, as the First National Bank had only such an interest as might be enforced against Dun or his general assignee.

Under such circumstances we are of the opinion that the property was liable to levy and that the execution required the sheriff (upon being properly indemnified as he was) to levy and hold the property under his levy to the end that a sale might be made of the property. The Second National Bank was a stranger to the replevin proceedings, and as to it the property was not in legal custody. So that the same could not be reached by levy upon its execution. (*Burkle v. Luce*, 1 *Coms.* 164, affirming S. C., 6 *Hill*, 558; *Manning v. Keenan*, 73 *N. Y.* 45; *Shipman v. Clark*, 4 *Denio*, 446; *Foster v. Pettibone*, 20 *Barb.* 350.)

The case before us differs from *Hague v. Lucas*, [] (10 *Peters U. S.* 400); and from *Seymour v. Newton* (17 *Hun*, 32), as in those cases there was an attempt to seize property upon process emanating from a different jurisdiction from the one under which it was held. In the last case cited *BOOKES, J.*, says, "To constitute a valid levy, the officer must bring the property under his dominion and control. This he cannot do while it is in the hands of another officer under levy, for he could not lawfully obtain any dominion over it,—*while thus in custody of the law.*"

Nor, is the respondent aided by *Gilbert v. Moody* (17 *Wend.* 357), which was a case of sale of house-

Bank of Oswego v. Dun.

['] hold furniture by a sheriff, and the purchaser left the goods upon the premises, and they were distrained, and the purchaser brought an action, and insisted the goods were in *custodia legis*, but the court held otherwise, as they had been sold by the sheriff and delivered, and his possession had ceased.

Nor does *Morris v. De Witt* (5 *Wend.* 71) reach the question here presented, as in that case the second ['] writ of replevin was by the defendant in the first writ, and the second was set aside on motion as the defendant in the first had an opportunity to try his title and rights to the bog or iron ore in the first action. We have not been able to discover how the Second National Bank could have tried and had determined its interest in the malt, if its execution and levy are set aside in the replevin suit, as it is not a party to that action, and therefore has no right to defend against First National Bank's claim of title set up in the replevin action.

It is insisted that Dun had no leviable interest in the malt, as he was a mortgagor without any right of possession, and therefore the sheriff could not levy in virtue of the Second National Bank's execution. The affidavits do not set out the warehouse receipt, or mortgage held by the First National Bank, and we cannot therefore determine the point made in the argument. Of course a mortgagor who has possession, and by the terms of the mortgage has a right of possession, has a leviable interest. (*Hull v. Carnley*, 11 *N. Y.* 501; *Hall v. Samson*, 19 *How.* 481; *Manning v. Monaghan*, 28 *N. Y.* 585.) But the position of the Second National Bank is that the mortgage or "warehouse receipt," is void as it was executed by Dun (*Bank v. Lang, supra*) and not filed or recorded in the clerk's office, so as to give it any validity as against a judgment creditor of Dun. On the other hand the First National Bank claims that the "ware-

Scheu v. Biehn.

house receipt," operated as a pledge, and that the subsequent delivery of the malt gives it validity and relies upon *Parshall v. Eggert*, 54 *N. Y.* 18.

As the paper is not set out, and the facts are not fully before us which affect the question, we do not pass upon the questions suggested, in regard to the interest or title of the First National Bank in the malt. From the views already stated, we think the Special Term fell into an error in setting aside the levy, and ['] in granting an order in the nature of an injunction upon the sheriff, and that its order so far as it is brought up by the appeal, should be reversed with \$10 costs and disbursements.

SMITH, P. J., and BOOKES, J., concurred.

SCHEU, APPELLANT v. LEHNING, ET AL.
BIEHN, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
OCTOBER, 1883.

§ 1583.

*Partition.—Action for cannot be maintained between remaindermen when actual partition cannot be had without great prejudice to owners.—
Purchaser of partition sale when not compelled to take title.*

It is now well settled that a purchaser at a judicial sale will not be compelled by the court to take title unless the same is free from reasonable doubt.[¹]

In an action for partition brought by one of two or more joint tenants or tenants in common of a vested remainder or reversion, where it clearly appears that an actual partition cannot be made without great prejudice to the owners, the court has no jurisdiction except to dismiss the complaint.[²] Such an action cannot be maintained

Scheu v. Biehn.

except only where actual partition of the property itself can properly be made.^[3]

Where one L. by his last will and testament devised and bequeathed to his widow F. L., the income of his property, both real and personal for her life, provided she should remain a widow, and directed that in case of her death or remarriage the remainder should be divided among his children, reserving to F. L. in case of her remarriage her dower in his estate, and one of the remaindermen brought an action for partition of the real property in which it was determined that actual partition could not be had without prejudice to the owners, and said F. L. agreed to accept a sum in gross in lieu of her interest in the estate "to be computed according to the principles applicable to life annuities pursuant to the Portsmouth or Northampton tables and the 71st rule of this court:" *Held*; that the value of her estate could not be determined by the tables mentioned,^[4] that the court had not power to direct a sale in such an action^[5] and where a sale was ordered and had, the purchaser was not bound to proceed and complete his purchase.^[6]

(Decided November 21, 1883.)

Appeal from order of special term denying motion to compel purchaser to take title.

The facts are stated in the opinion.

George Hoffman (*Henry Kropf*, attorney), for plaintiff, appellant.

The purchaser objects to the jurisdiction of the court in the case at bar, because under *Sullivan v. Sullivan* (66 N. Y. 38), a co-remainderman had no right to institute partition, and that therefore the court has no jurisdiction to entertain it. The *non-sequitur* of the above proposition is at once apparent. The rights of the plaintiff are not the test of the jurisdiction of the court to pass upon them as to the subject matter affected, and the above objection is clearly not a jurisdictional one, which it must be, as will be shown hereafter, to be tenable at the instance of a purchaser. . . .

The principle that a purchaser can raise successfully only objections affecting the jurisdiction of the court is

Scheu v. Biehn.

emphatically laid down in *De Forest v. Farley*, 62 *N. Y.* 628; *Howell v. Mills*, 56 *N. Y.* 226; *Jenkins v. Fahey*, 73 *N. Y.* 355; reversing *S. C.*, 11 *Hun*, 351; *Alvord v. Beach*, 5 *Abb. Pr.* 451; *Cochrane v. Van Sur- lay*, 20 *Wend.* 365; *Mead v. Mitchell*, 5 *Abb. Pr.* 92; *S. C.* affirmed, 17 *N. Y.* 210.

As regards purchasers, the only question is, whether all proper parties are before the court, not how the court has adjudged their rights, or has distributed the proceeds of the sale. If all the parties in whom an interest exists which could at all disturb his title are parties to the suit, and a sale is decreed, the purchaser need look no further. His protection is perfect. *Holden v. Sackett*, 12 *Abb. Pr.* 473. All the persons interested being parties, no one but themselves can raise any question as to their respective interests as between themselves, or object to the judgment of the court. An outsider cannot. *Blakeley v. Calder*, 15 *N. Y.* 617; *Brevoort v. Brevoort*, 70 *N. Y.* 136. In the case of *Jackson v. Edwards* (22 *Wend.* 518), Senator Verplank says: "But the validity of the sale does not necessarily depend upon the just application and apportionment of the fund raised by it. The latter, though an important part of the duty of the court, may be carelessly or erroneously performed, or its performance may be waived by the negligence or the acquiescence of the parties, but in neither case ought the sale, and the conveyances under it, be disturbed."

The rule is well settled that a judgment rendered by a court having competent authority to deal with the subject matter involved in the action, and jurisdiction of the parties, although against the facts, or without the facts, to sustain it, is not void as rendered without jurisdiction, and cannot be questioned collaterally. *Hunt v. Hunt*, 72 *N. Y.* 218; *Jenkins v. Fahey*, 73 *N. Y.* 355. See also *Jordan v. Van Epps*, 85 *N. Y.* 427; affirming *S. C.*, 19 *Hun*, 526.

Scheu v. Biehn.

The judgment is final and conclusive between the parties, not only as to the matters actually determined, but as to every other matter which the parties might have litigated, and have decided as incident to or essentially connected with the subject matter of the litigation within the purview of the original action, either as matter of claim or defense. *Clemens v. Clemens*, 37 *N. Y.* 74; *Bloomer v. Sturges*, 58 *N. Y.* 176; *Jordan v. Van Epps* (*supra*).

Under the statutes of this state, when all of the parties in being having any estate or interest, present or future, vested or contingent, in the lands, are made parties to an action for partition, a purchaser at a sale under a judgment therein acquires a perfect title. *Brevoort v. Brevoort*, 70 *N. Y.* 136.

Wyatt & Trimble, for purchaser, respondent.

The court had no jurisdiction to entertain this action at the suit of one of several holders of a vested remainder; any sale thereunder must therefore be void.

Prior to the enactment of section 1533 of the Code of Civil Procedure, holders of a vested remainder could not maintain an action of partition at all. The court of appeals settles this. *Sullivan v. Sullivan*, 66 *N. Y.* 37; *Morse v. Morse*, 85 *N. Y.* 57; *Stewart v. Monroe*, 56 *How. Pr.* 194.

That a purchaser at a sale made in an action to maintain which the plaintiff had no legal right, will be released, was held in a very similar case. *Harris v. Larkins*, 22 *Hun*, 448. The fact that the life-tenant, after the entry of an interlocutory judgment, consented to take a gross sum in lieu of her estate, cannot affect the question, her life estate is still extant, it has not fallen in; moreover her estate was for life or widowhood, and there is no provision for such consent. Section 1569 only allows it for a life estate in an undivided share of the property sold. . . . Allowing that this action

Scheu v. Biehn.

for partition could be maintained, the court had no power to order a sale. Code of Civil Procedure, § 1533. . . .

This clearly forbids just such a sale as this, and manifestly it was the intention of the Legislature that if it did allow remaindermen to institute partition, it should be for partition only, and such a sale should not be had. *Hughes v. Hughes*, 2 *N. Y. Civ. Pro.* 139. For the court to order a sale in the face of this statute, would in the words of Mr. Justice DANIELS, "involve the exercise of an authority which the Legislature have declared no court shall possess." *Muller v. Struppman*, 6 *Abb. N. C.* 343.

J. Van Vechten Olcott, for adult defendants, appellants.

Robert A. Livingston, for infant defendants.

DAVIS, P. J.—Peter J. Lehning died in 1867, seized of the premises sought to be partitioned by this action, leaving him surviving Frederica Lehning, his widow; the plaintiff, his daughter by a former wife, and Julia Van Cott, William George Lehning and Carolina Louisa Fredrica Lehning his children by the defendant Frederica Lehning, all of whom are still surviving and of full age, except Caroline Louise Frederica Lehning who is an infant.

By his last will and testament he gave, devised and bequeathed to his widow the rents, issues and profits of his estate, as well real as personal during her natural life, provided she should remain his widow. By the third clause of his will he gave, devised and bequeathed to his children upon the death or remarriage of his widow, whichever should first occur, all the rest, residue and remainder of his estate, as well real as personal, to be divided among them equally,

Scheu v. Lehnig.

share and share alike; reserving, however, to his widow in case of her marriage, her dower in his estate. By other provisions he appointed his widow guardian of the person and estate of his children, during minority and nominated her sole executrix of his will. This will was duly admitted to probate. This action is brought by Charlotte L. Scheu, one of the devisees of the estate in remainder for the purpose, among other things, of having a partition and division of the premises described in the complaint, according to the respective rights and interests of the parties, or, if such partition could not be made, that the same be sold under the direction of the court, and the proceeds divided among the parties according to their respective rights and interests. The defendants appear, in the action, the infant defendant by her guardian, the other defendants by attorney. On a reference to ascertain whether actual partition could be made, the referee reported for good reasons, that the property was not capable of equal partition, and that the only mode of division was by a sale. The widow filed in due form a consent that the property be sold, and an agreement to accept in lieu of her life or other interests in the premises and in satisfaction thereof a sum in gross out of the proceeds of the sale according to her rights to be ascertained by the reports of the referee therein, "such sum to be computed according to the principles applicable to life annuities, pursuant to the Portsmouth or Northampton tables and the 71st rule of this court."

Upon the coming in of the referee's report, the infant defendant, by her guardian, filed exceptions to the report, substantially insisting that, upon the facts, no sale of the premises could be lawfully made. The court overruled the exceptions and gave judgment directing a sale and division of the proceeds. The premises were thereupon sold by the referee appointed

Scheu v. Lehning.

for that purpose, and at the sale were struck off to the respondent John Biehn, who paid ten per cent. of the purchase money and executed the ordinary memorandum of the sale. At the time fixed for the delivery of the deed, he appeared by his counsel and refused to proceed on the ground in substance that a good title could not be made under the judgment and sale. A motion was then made at special term, to compel the purchaser to take title, which motion was denied, and the plaintiff and the widow appealed from the order of denial.

It is now well settled that a purchaser at a judicial sale will not be compelled by the court, to take title unless the same be free from reasonable doubt (*Schrive v. Schriver*, 86 *N. Y.* 580; *Jordan v. Poillon*, 77 *N. Y.* 518).

This action, so far as relates to the partition of the property, is brought under section 1533 of the Code, which is in these words: "Where two or more persons hold as joint tenants or as tenants in common, a vested remainder or reversion, any one or more of them may maintain an action for a partition of the real property to which it attaches according to their respective shares therein, subject to the interest of the person holding the particular estate therein, but in such an action the property can be sold, and if it appears at any stage thereof that partition cannot be made without great prejudice to the owners the complaint must be dismissed, such a dismissal does not affect the right of any party to bring any action after the determination of the particular estate."

This section is distinctly applicable to and controlling of the question before us. Under it the court had jurisdiction to entertain an action for the purpose, if that were practicable, of making an actual partition. But when it appeared, as it clearly does in this case that such partition could not be made without great

Scheu v. Lehning.

prejudice to the owners, it had no jurisdiction except to pronounce the judgment dismissing the complaint, so far as it related to that relief. Whatever may have been the law prior to the enactment of this provision, relative to the right to maintain actions of partition in such cases, the code by the section cited, has taken possession of the whole subject matter and subjected it to the conditions prescribed by the sections itself. So we

think an action of partition cannot be maintained, ['] except where only actual partition of the property itself can be properly made. It is supposed, however, that the consent of the widow that the property be sold and the value of her particular estate be ascertained and paid to her, enabled the court to proceed and pronounce the judgment of sale. In the first place, it may be suggested that the course of proceeding was not applicable to the case, because her estate was one the value of which could not with certainty be ascertained under any rule or practice of the court. The estate given to her was for her life if she remained the widow of the testator. Upon remarriage the estate under the devise was wholly to terminate, and she be remanded to her dower interest alone. The value of such an estate cannot be determined by the tables ['] mentioned in the stipulation. If it be treated as an absolute life estate, gross injustice may be done by paying over to her the value of such an estate divested of the condition which the testator imposed.

The condition was a legal one, and the courts are bound to regard, however much they disapprove it. Of course, if the rights of an infant did not intervene, and the parties were all of lawful age, they might make such a mutual agreement for the disposition of the property and division of the proceeds, as should suit their interests, but they would not require the intervention of any action or partition, nor the judgment of any court. When, however, a suit is brought for

 Place v. Riley.

partition in a case of this character, especially where the rights of an infant can be affected, the court is bound to see to it that its judgment must not exceed the powers conferred by the statute.

In this case the purchaser could not under the circumstances receive a title by the referee's deed, ['] free from reasonable question or doubt. He was not bound, therefore, to proceed and complete the purchase.

The order of the court below must be affirmed with \$10 costs, besides disbursements.

BRADY and DANIELS, JJ., concurred.

PLACE, RESPONDENT v. RILEY, APPELLANT,
WHITTAKER AND WILLIS, RESPONDENTS.

SUPREME COURT, SECOND DEPARTMENT, GENERAL
TERM, DECEMBER, 1883.

§§ 707, 708, 1370.

Execution—form of, where summons served by publication.—Must direct satisfaction of judgment out of personal property not attached, when publication founded on defendant's concealment within the state.

Where the summons in an action was served by publication and the defendant has not appeared, if the publication was against a non-resident the execution must go only against property which has been attached; and if the publication was made as provided for in cases of residence and concealment in the state the execution must go against, (1) the attached personal property, (2) other personal property, (3) attached real estate, and (4) other real estate. The principle established is that non-residents should only answer by the attached property, and residents shall answer generally, but in the order stated.

Place v. Riley.

Where judgment was taken by default in an action in which the summons was served by publication, on the ground that the defendant being a resident of the state concealed himself and evaded service of the summons, and an execution issued on said judgment directed the sheriff to satisfy it, "out of the personal property attached by you in this action, and if that is insufficient out of the real property heretofore attached by you in this action in your county belonging to such judgment-debtor." *Held*, that the execution and a sale thereunder, of real property belonging to the judgment-debtor should be set aside; that the omission of a direction to satisfy the judgment out of the personal property of the debtor not attached was not a mere irregularity, but a fatal defect.

(*Decided February 11, 1884.*)

Appeal from an order denying a motion to set aside a sale of real property under execution.

This action was begun on May 7, 1876, by the service of a summons on the defendant by publication, and was brought to recover the sum of \$131, a balance alleged to be due from the defendant to plaintiff for goods sold and delivered.

The defendant, at the time of the commencement of the action was a resident of this state, and was proceeded against in this action as "being a resident of this state, but that he had departed therefrom, with intent to cheat and defraud his creditors, or that he kept himself concealed therein with like intent." A warrant of attachment was issued August 5th, 1878, on the same ground as above set forth, under which defendant's real estate was attached. The defendant was not personally served with process, did not appear therein, and judgment was taken against him by default August 20th, 1878, for \$226.37. On the same day an execution was issued to the sheriff of Queens county, which after reciting the recovery of the judgment; that it had been duly docketed in Queens county and that \$226.37 was actually due thereon, continued as follows: "Therefore we command you that you satisfy the said judgment out of the personal property at-

Place v. Riley.

tached by you in this action and if that is insufficient out of the real property heretofore attached by you in this action in your county belonging to such judgment debtor and return this execution within sixty days after its receipt by you, to the clerk of the county of Queens."

Under this execution certain real property of the defendant situate in the village and town of Hempstead in the county of Queens, which had theretofore been attached under the warrant of attachment, above mentioned, was levied upon and sold under said execution by said sheriff, in the latter part of October in the year 1878, and bid off on the day of sale by Owen Riley, for \$500, and after the time to redeem had expired, was conveyed by said Owen Riley to Wittaker and Willis.

About October 1, 1880, the defendant returned to this state and immediately proceeded to have the judgment taken against him by default opened, and defended the action. In April, 1882, the cause was tried and a verdict rendered in his favor.

He thereafter moved to set aside the sale under execution and the deeds to Owen Riley and from him to Whittaker and Willis.

The motion was denied and this appeal taken from the order thereupon entered.

George A. Mott, for appellant, cited in support of contention that the defendant being a resident of the state the judgment was *in personam*. *Pope v. Terre Haute Car Man'f. Co.*, 87 *N. Y.* 137; *Gibbs v. Queen Ins. Co.*, 63 *Id.* 124; *Hunt v. Hunt*, 72 *Id.* 237; *Haswell v. Lincks*, 87 *Id.* 637; that the judgment was against the defendant's property generally, and should first have been satisfied out of his personal property *Freeman on Executions*, pp. 459, 460; *Code of Civil Procedure*, § 1370.

Place v. Riley.

B. W. Downing (*A. N. Weller*, attorney), for respondents Whittaker and Willis.

The execution could only issue to sell the property attached, for the judgment was not a personal judgment but a judgment *in rem*, condemning the property levied upon by the attachment, *Force v. Gower*, 23 *How. Pr.* 294; *Warren v. Tiffany*, 9 *Abb. Pr.* 66; S. C., 17 *How. Pr.* 106; *Thatcher v. Bancroft*, 15 *Abb. Pr.* 243; *Phelps v. Baker*, 60 *Barb.* 107; *Fiske v. Anderson*, 33 *Id.* 71; S. C., 12 *Abb. Pr.* 8; *Hulbert v. Hope Mut. Ins. Co.*, 4 *How. Pr.* 275 . . . see also *McKinney v. Collins*, 88 *N. Y.* 216 . . . But at most the execution was merely irregular, and will not be set aside unless the defendant has been prejudiced by the irregularity. *Hill v. Haynes*, 54 *N. Y.* 156; *Hutchinson v. Brand*, 6 *How. Pr.* 77; *Douglas v. Haberstro*, 2 *N. Y. Civ. Pro.* 186; *People ex rel. Brown v. Van Hoesen*, 62 *How. Pr.* 77; *Park v. Church*, 5 *Id.* 383. The irregularity in the process of the court can be amended at any time. *Williams v. Hogeboom*, 22 *Wend.* 648; *Benedict & Burnham Manf. Co. v. Thayer*, 20 *Hun*, 547; *Boyce v. Vanderkemp*, 1 *Barb. Ch.* 273; see *Ovoronhe v. Terry*, 17 *N. Y. Weekly Dig.* 503; *Code of Civ. Pro.* § 723. The title of a *bona fide* purchaser will not be affected by mere irregularities in the execution. *Jackson v. Cadwell*, 1 *Cow.* 622; *Averill v. Wilson*, 4 *Barb.* 180; *Chautauque Co. Bank v. Risley*, 4 *Denio*, 480.

Foster & Stephens, for respondent, Place.

BARNARD, P. J.—This is a hard case. The plaintiff procured an attachment against the defendant as an absconding debtor. There was proof tending to show very strongly that the defendant left the state of New York under such circumstances as would justify the inference that he intended to cheat creditors.

Place v. Riley.

The summons was served by publication. The papers do not show the affidavits on which the order to publish was issued, and it must be assumed that they made out a case under section 438 of the Code. A general execution was issued, and under it the sheriff of Queens county sold the defendant's real estate. The property brought probably less than half its value. The time to redeem ran out and the purchaser at the sheriff's sale conveyed the land to Whittaker & Willis, who now occupy the same. After the time for redemption expired the defendant returned to this state. He applied to open the case and answer. He obtained such leave, answered, tried the case before a jury and succeeded in his defense. Thus the defendant has been sold out for a debt which did not exist. This fact does not determine the case. The judgment was regular and in full force when the sale was made. The purchaser bought on the faith of the judgment and his grantees have bought on the faith of the judgment and his grantees have bought on the faith of this title, and have made large repairs on the premises. The execution was not regular. I assume from the papers that the attachment was against a resident who had fled with evil intent. It is also to be inferred that the order of publication was based upon the same allegation. Only two executions were proper. If the publication was against a non-resident, then the execution could only go against the property attached. If the publication was made as provided for in cases of residence and concealment in the state the execution must have gone against, 1st, the attached property; 2d, other personal property; 3d, attached real estate; 4th, other real estate (Code, 1370). The principle established is that non-residents shall only answer by the attached property, and residents shall answer generally, but in certain prescribed order of sale. This execution violated this section. It left out from the levy personal property

Townsend v. N. Y. Life Ins. Co.

of the alleged debtor not actually attached. The sale of the real estate was therefore irregular and void. There is proof tending to show other personal property than that attached, but in the absence of such proof the execution must follow the statute so that actual search by the sheriff should determine the fact. The omission was not a mere irregularity and thus amendable. The case is as if an execution should direct the sale of the debtor's lands in the first instance. The order should be reversed and the execution and sale under it set aside without costs.

DYKMAN, J., concurred.

TOWNSEND, RESPONDENT, v. THE NEW YORK
LIFE INSURANCE COMPANY, AS
ADMINISTRATOR, ETC., APPELLANT.

COURT OF APPEALS, JANUARY, 1884.

§ 531.

Bill of particulars.—Rule as to pleading account and failure to serve does not apply to reference of claim against administrator.—Administrator may require vouchers, affidavit of creditor and items of claim to be presented to him.—When general agent cannot delegate authority or appoint another general agent.

An administrator to whom a claim against his intestate's estate is presented is entitled both to vouchers and the affidavit of the creditor thereto, and also has power at its presentation and before rejecting it or consenting to a reference to require that the claim be made more definite and certain.[']

Where an administrator upon the presentation of a claim against his intestate's estate demanded a bill of items, but without any being furnished united in an agreement with the creditor to refer pursuant

Townsend v. N. Y. Life Ins. Co.

to the provisions of the revised statutes (2 R. S. 88, § 84) by which issues were formed. *Held*, that the case was not within the provisions of the code (§ 531) which prescribe how an account shall be pleaded and the penalty for omitting to serve a bill of items;[³] that the referee did not err in refusing to find as a matter of law that the plaintiff, having furnished no bill of particulars, was precluded from giving evidence of, or from recovering for, if proved, the items fairly within his statement of his claim;[⁴] that the referee could not vary or enlarge the matters referred nor could he reject evidence of any item fairly within the scope of plaintiff's claim.[⁵] Where a claim for "services in aiding in the care and protection" of an estate was presented to an administrator and by consent referred, pursuant to the revised statutes (2 R. S. 88, § 84): *Held*, that the referee exceeded his discretion in allowing for services rendered as an attorney;[⁶, '⁷] that such matters were not referred to him;[⁷] and the judgment should be reduced by the amount so allowed;[⁷] that services rendered by reason of a special relation would naturally be the subject of a distinct and specific statement.[⁸]

Where one T. presented a claim to the administrator of the estate of B. for "services in aiding in the care and protection of" said estate, and the claim was duly referred, and on the trial T. proved his "actual and continued employment by one Smith," and it appeared that "B." had given said Smith and one P. a power of attorney whereby she appointed them her "true and lawful joint attorneys and general agents . . . to attend to the business of and manage all and singular" her business affairs and concerns: *Held*, that while the authority of Smith as general agent would no doubt include power to employ necessary means to render his agency effectual the written power does not in terms or by implication authorize him to delegate his authority or put another agent in his place,[⁹] and that such allegation of agency by Smith, or such general employment as is claimed, if it existed, would have been unauthorized and "B." not bound.[⁹]

(*Decided, February 8, 1884.*)

Appeal from a judgment of the general term of the supreme court, first department, affirming judgment entered on the report of a referee.

July 18, 1872, Mrs. Charlotte Brinckerhoff died and thereafter the defendant was appointed her administrator. The plaintiff subsequently presented a claim against her estate which was as follows:

 Townsend v. N. Y. Life Ins. Co.

THE N. Y. LIFE INSURANCE AND TRUST CO.
 Adminrs. &c., of Mrs. CHARLOTTE BRINCKERHOFF,
 Vs. JOHN J. TOWNSEND, Dr.

1868

April 21.	For my services in aiding in the care and protection of the estate of Mrs. Brinckerhoff, from Nov. 1, 1868, to date, and for advice in transactions relating thereto	\$6,000
-----------	--	---------

1869.

May 1.	Cash paid counsel for consultation and advice	250
	Interest on last item to May 1, 1873	70
		\$6,320 "

A demand for bill of items of this account was served on the plaintiff, but no bill of particulars was ever made or served.

The claim was thereupon duly referred under a written agreement between the parties.

On the trial it appeared that Mrs. Brinckerhoff and her sister, Miss Louisa Troup, inherited a large estate from their father, which was never divided but was held in common by them; that Frederick Bronson, up to Nov. 1, 1868, when he died, had charge of their entire estate as their agent, and had in his employ for many years one Elias L. Smith, who thus became familiar with all the business connected with the estate of these ladies, that said Bronson died on the 1st of November, 1868, leaving the plaintiff, John J. Townsend his executor, that the plaintiff at that time took possession of the estate of Frederick Bronson, and also of the property belonging to Miss Troup and Mrs. Brinckerhoff, that in December, 1868, shortly after Bronson's death, Mrs. Brinckerhoff appointed Elias L. Smith and Robert L. Pell her joint attorneys and agents

Townsend v. N. Y. Life Ins. Co.

to take charge of her estate, and that on February 2, 1869, Miss Troup wrote plaintiff the following letter :

“NEW YORK, Feb. 2d, 1869.

“Dear Mr. Townsend :

Mrs. Brinckerhoff and myself thank you kindly for the interest you have taken in our affairs. We prefer that Mr. Pell and Mr. Smith should serve us under the power of attorney given them. If Mr. Smith declines, perhaps our relative, Mr. Ireland, could be induced to take his place. We should like to have Mr. Calhoun retained as Mr. Smith's assistant.

Respectfully yours,

MISS LOUISA TROUP.”

The referee found, among other things, “that from the date of Frederick Bronson's death until the appointment of the New York Life Insurance and Trust Company, as the administrator of Mrs. Brinckerhoff, the claimant, John J. Townsend, by the authority and employment of Mrs. Brinckerhoff, had the same charge, management and care of her property and securities as Frederick Bronson in his lifetime had had, and rendered the same services in and about the same as the said Bronson had previously rendered, supervising the keeping of the accounts of the estate, directing Mr. Smith, who continued to act as the clerk and book-keeper in the performance of his duties, keeping the property invested and re-invested, adjusting and paying the taxes upon the property, attending to all questions and matters arising in regard to it, and carrying on all negotiations incident to it,” and that the plaintiff was entitled to judgment against the defendant for \$5,376.30. Further facts are stated in the opinion.

Ira D. Warren, for appellant.

The power of attorney being joint, Smith had no

Townsend v. N. Y. Life Ins. Co.

authority under it to employ Townsend without Pell's assent. . . . Much less could he employ another agent to direct and control the business, who should be entitled to a commission on the whole estate. Pell and Smith jointly could not do this; much less could Smith alone. *Guildersleeve v. Board of Education*, 17 *Abb. Pr.* 202; *Green v. Miller*, 6 *Johns.* 38; *Holtsinger v. Corn Exchange Bank*, 6 *Abb. N. S.* 296; *Sinclair v. Jackson*, 8 *Cow.* 544; *Oakley v. Aspinwall*, 3 *N. Y.* 565; *Perry v. Lynen*, 22 *Barb.* 137; *Howes v. Walker*, 23 *Id.* 304.

Joseph H. Choate, for respondent.

DANFORTH, J.—The proceeding brought up by this appeal was instituted under sec. 34, t. 3, p. 2, ch. 6, art. 2, of the R. S. (2 vol. p. 88) relating to the duty of administrators, &c., in the payment of debts and legacies. It must be assumed that the claim as presented conveyed sufficient information to the defendants, for so far as appears they demand neither vouchers nor the affidavit of the creditor. To both these modes of verification they were entitled before they could be called upon to pay, or even to express a doubt of the justice of the claim (sections 35, 36, ['] *Id.*). It was also in their power at its presentation, and before rejecting it, or consenting to a reference, to require that the claim be made definite and precise (*Weller v. Weller*, 4 *Hun*, 196). They were confronted with a demand, which, if just, they were bound to pay, if unjust to resist, and as to which they were entitled to particulars, if from its generality or for other reason they were in doubt whether to pay or reject it. It seems that they did demand a bill of items, and that it was not furnished. But, instead of insisting upon it they united with the creditor in an agreement by which an issue was formed. That agreement consti-

Townsend v. N. Y. Life Ins. Co.

tuted the pleadings between the parties. On the one side the claim in writing, and a denial on the other that the alleged creditor was ever retained by the intestate, or that he had rendered any service for which he had not been paid. It was approved by the surrogate, and in accordance with the statute (*supra*), a referee was appointed by the supreme court "to hear and determine the matter in controversy mentioned in the agreement." The referee could not vary or

[*] enlarge this matter, nor could he reject evidence of any item fairly within the scope of the claim.

The case is not within the provisions of the Code (§ 531), which prescribe how an account shall

[*] be pleaded and the penalty for omitting to present a bill of items. If the claim had been rejected the creditor would have been driven to his action and the defendant could then have had all the means of defense given by the Code. But the proceeding adopted is a special one, and governed by provisions of the Revised Statutes (*supra*, and sec. 59), all of which are still in force. The learned referee therefore, did not err in refusing to find as matter of law that the

[*] plaintiff, having furnished no bill of particulars, was precluded from giving evidence of—or from recovering for, if proved—the items fairly within his statement.

Second. But in respect to another question, the referee exceeded his discretion. The plaintiff's

[*] claim was limited by its terms to compensation for services rendered in the general care and protection of the estate of Mrs. Brinckerhoff (defendant's intestate), and the referee allowed for that the sum of \$5,026.30, or five per cent. upon the income of her estate from the 1st of November, 1868, to the 31st of October, 1873. This allowance answered the claim of the creditor, and may be said to be within its scope and meaning; but neither the claim nor the measure of

Townsend v. N. Y. Life Ins. Co.

compensation had any reference whatever to the plaintiff in his professional capacity. Services rendered by reason of a special relation would naturally be the subject of a distinct and specific statement. The claim is not of that description, but is a general one for care and aid in the protection of the estate—services which any one may render. The evidence shows the services to have been of that nature. The claimant was the executor of the estate of Bronson. Bronson had in his lifetime charge of Mrs. Brinckerhoff's estate, and the claimant, as he testifies, immediately upon the decease of Mr. Bronson, took the entire assets of the estate into his possession, "kept it, invested it and watched over it;" and the referee finds that Bronson during his life "cared for and managed Mrs. Brinckerhoff's estate, and for his services in the matter charged and received five per cent., upon the income of that estate." In substance he finds that the claimant rendered similar services, and for those allows the same rate of compensation; and all this was no doubt fairly within the agreement under which he was acting as referee. But he went beyond this. He allowed, against the objection of the defendant, evidence of the claimant's acts in a professional capacity as attorney and counsel in defending an action brought against Mrs. Brinckerhoff and Miss Troup as co-defendants, in conducting proceedings in court for disposing a tenant, and in preparing a codicil to Mrs. Brinckerhoff's will, and for these services reported an additional and separate compensation of \$350. These matters were not referred to him, and in their allowance the referee erred. But with the assent of the claimant the judgment as to these items might be corrected, leaving the residue to stand.

It becomes necessary, therefore, to examine the more important question relating to the main item—that embraced in the claim. There is evidence that

Townsend v. N. Y. Life Ins. Co.

services were rendered by the claimant in relation to the estate of Mrs. Brinckerhoff, under circumstances above adverted to, but we are unable to find that they were rendered upon any authority conferred by her or with her knowledge, or that the claimant's acts were at any time ratified by her. The referee has undoubtedly found to the contrary of this. He reports that from the death of Bronson until the appointment of the N. Y. Insurance and Trust Co. (the appellant), the claimant acted in the matters referred to under her authority and employment; when conferred or how is not stated, and, as above said, we find no evidence of it. Indeed, the learned counsel for the respondent concedes that the usual evidence of such employment was not given, but he relies upon proof of the claimant's "actual and continued employment by one Smith," who, he says, held her general power of attorney. We are to look then to that instrument to ascertain the nature and the extent of the authority conferred upon that person. "I constitute and appoint," she says, "Elias L. Smith and Robert L. Pell my true and lawful joint attorneys and general agents . . . to attend to the transaction of and manage all and singular my business affairs and concerns whatsoever." Smith acted as such; attended, as the claimant testified, to everything that was done, and his conferences with him in respect to matters in the estate were daily and continuous. He made investments with the knowledge and request of Smith, and undoubtedly he is shown to have done other things under like circumstances. It may well be that for some of these services, and perhaps all, he would be entitled to recover as for acts done in aid of Smith and for the benefit of the estate.

But he is not now claiming for specific services; he claims compensation for general services to the entire estate, and for advice in transactions relating thereto.

Townsend v. N. Y. Life Ins. Co.

as if upon a continuous employment, and in that character he could not have recovered. Of the value of specific services no evidence has been given. The authority to Smith, as general agent, would no doubt include ['] power to employ necessary means to render his agency effectual. But the written power does not, in terms, or by implication, go to the extent of authorizing him to delegate his authority, or put another agent in his place. It is obvious that Smith was selected to do the very things which are embraced within the general claim now made by the respondent, and that they were covered by the terms of his employment and by the compensation awarded to him. I do not wish to ['] be understood as finding that there is evidence either of a delegation of agency by Smith, or such general employment as is claimed, but if either existed the relation would have been unauthorized and Mrs. Brinckerhoff not bound.

The respondent claims that as the books of the estate were referred to on the trial, and are not brought here, we cannot say that within their covers evidence may not have been found for the satisfaction of the referee. I think it may fairly be inferred that all the evidence was inserted in the case which the claimant thought material, but if not it does not appear that the books were in any way referred to as containing evidence as to the employment of the claimant. They were offered by him as containing evidence of receipts and payments by the estates during the period covered by his claim, and apparently to show the amount of the estate, and from them no doubt the learned referee ascertained the income upon which commissions were allowed. It is not suggested that they were before him for any other purpose, and as to that no inaccuracy is alleged. The respondent also refers to another item of evidence, a letter produced by him as containing a recognition by Mrs. Brinckerhoff of his employment.

Townsend v. N. Y. Life Ins. Co.

The power of attorney was executed on December 16, 1868; the letter February 2, 1869. We find in it no evidence of knowledge of past services, or a desire to give the respondent future employment. It seems to exclude both. It was written by Miss Troup, who, to some extent, was interested with Mrs. Brinckerhoff. In behalf of both she thanks the respondent, not for services rendered, but "for the interest you have taken in our affairs," and apparently makes answer to an offer of service, or exercising an option in some way brought before them, says, "We prefer that Mr. Pell and Mr. Smith should serve under the power of attorney given them," and suggests that Mr. Ireland be substituted for Smith if the latter declines, and wishes Mr. Calhoun retained as Smith's assistant. It may be conceded that, if already employed, it does not discharge the respondent. It does not recognize his employment, or express a wish for his services. It seems to decline proffered services. Upon another trial other testimony may be produced; but as the case now stands, and on the plaintiff's showing, we have not found evidence which under any reasonable construction will sustain the referee's findings, and are therefore constrained to say that the appeal from his decision was well taken, and that the judgment of the supreme court should be reversed, new trial granted, costs to abide the event.

All concurred.

Funk v. Tribune Association.

FUNK v. THE TRIBUNE ASSOCIATION.

CITY COURT OF NEW YORK, SPECIAL TERM,
JANUARY, 1884.

§§ 870, 880.

The plaintiff in an action for libel may be examined before trial as to the truth of the alleged libel where such examination will not subject him to a criminal prosecution or a penalty or forfeiture, or render him infamous.—Questions which may in any way do that should not be allowed, and the witness should not be required to plead his privilege as an excuse for not answering them.

The rules that the court will not compel a defendant in an action for libel or slander to furnish evidence in answer to a bill of discovery, to maintain the action and subject him to punitive damages in the nature of the penalty, does not prevent the defendant compelling a discovery from the plaintiff of the truth of the alleged libel, where such discovery will not subject him to a criminal prosecution or to a penalty or forfeiture or render him infamous.

On an examination of a party before trial, no questions should be permitted, the answers to which may in any way tend to subject the witness to a criminal prosecution or penalty, or render him infamous, nor should he be required to plead his privilege as an excuse for not answering, such a requirement, being contrary to the spirit and intent of the rule regulating such examinations

(Decided January 5, 1884.)

Motion to vacate an order for the examination of the plaintiff before trial in an action for libel.

This action was brought by plaintiff to recover \$2,000, damages alleged to have been suffered by reason of the publication of an alleged libelous article in the Tribune, a daily newspaper published by the defendant. The defendant procured an order for the examination of the plaintiff before it had answered, to enable it to prepare its answer and for trial, which

Funk v. Tribune Association.

order plaintiff now seeks to have vacated and set aside.

McADAM, Ch. J.—While it is true that the courts will not compel a defendant, in an action for libel or slander, to furnish evidence in answer to a bill of discovery to maintain the action and subject him to punitive damages in the nature of a penalty (5 *Barb.* 297 ;* 9 *Paige*, 580 ;† 2 *Abb. N. C.* 158 ;‡ 14 *Hun*, 122 ¶), the rule does not prevent the defendant compelling a discovery from a plaintiff of the truth of the alleged libel, where such discovery will not subject him to a criminal prosecution, or to a penalty or forfeiture, or render him infamous (9 *Paige*, 580 ;† 26 *Hun*, 166 §). The application to vacate the order for examination will therefore, be denied, and the plaintiff will be required to submit to the required examination, but no question will be permitted, the answer to which may in any way tend to subject her to a criminal prosecution or penalty, or to render her infamous, nor will the witness be required to plead her privilege as an excuse for not answering such questions, such a requirement being contrary to the spirit and extent of the rule regulating such examination (see 26 *Hun*, 169 §). So limited, the examination may be had on the 9th day of January, 1884, at 10 A. M., and the defendant to have three days within which to answer after the completion of such examination.

* *Bailey v. Dean.*† *March v. Davidson.*‡ *Phoenix v. Dupuy.*| *Brandon M'fg Co. v. Bridgman.*§ *Kinney v. Roberts & Co.*

Krause v. Averill.

KRAUSE v. AVERILL.

CITY COURT OF NEW YORK, SPECIAL TERM,
NOVEMBER, 1883.

§§ 421, 422.

Appearance.—When notice of appearance sufficient:—Order extending time to answer valid although defendant has not appeared.

The fact that section 421 of the Code of Civil Procedure has prescribed a certain form in which the defendant's attorney must add his signature to a notice of appearance, demurrer or answer does not make such a paper when varied somewhat in that regard, void.[¹, ⁴]

The court has jurisdiction to grant an order extending a defendant's time to answer, where he has not appeared, and its order is valid until set aside.[², ³, ⁵]

(Decided November 22, 1883.)

Motion that the plaintiff be required to accept service of an order extending defendant's time to answer.

The opinion states sufficient facts.

William J. Cannon, for the motion.

Charles K. Lexow, opposed.

HAWES, J.—It appears that the defendant in this case obtained an order extending time to answer, and served the same upon the plaintiff's attorney, but served no formal notice of appearance. Judgment was entered by plaintiff as for want of an answer, and no notice of subsequent proceedings was served upon defendant's attorney, and the question now presented is whether sections 421 and 422 of the Code have so

Krause v. Averill.

modified the former practice that the order of extension and papers upon which it is based are void. The case of *Couch v. Mulhane* (63 *How.* 79) would seem in its language to sustain the plaintiff's theory, and, to a certain extent, the same may be said of the case of *Douglas v. Haberstro* (58 *How.* 276), although in the latter case the question here presented was not necessarily involved. Upon an examination of the statute I am unable to discover any such radical changes in the practice as these decisions would seem to imply. Section 421 is a substitute for section 130 of the Code of Procedure, and defines in terms the requisites of a formal notice of appearance when such appearance is made; but these formal requisites were substantially the same as those existing under the old practice; and under the strictest construction their specific requirements were demanded only when the appearance was to meet certain well-known provisions of the statute. It seems to me, however, that because section 421 of the Code has prescribed a certain form in which ['] the defendant's attorney must add his signature to a notice of appearance, demurrer or answer, that the paper so served is not void even though it should vary somewhat in that regard. In the case at bar (and the same may be said of all similar cases) the attorney, under oath, in his application for the order, states that he is the attorney for the defendant in the above entitled action, and he is so described in the affidavit of merits sworn to by the defendant. The papers are indorsed by the attorney as attorney for the defendant, and his office address also indorsed in the usual manner. These papers so indorsed, including the order of the court extending time for defendant to answer, were served upon the plaintiff's attorney within the required time. The court, acting upon the papers submitted, extends defendant's time to answer. Can it be claimed that under such circumstances the

Krause v. Averill.

court acquired no jurisdiction to grant the order, and is not this a substantial test as to whether it was or was not a void appearance? The fact is, as it seems to me, that the act was one which took place during the progress of the case, and that the defendant has submitted to the jurisdiction of the court and he is estopped from denying its validity. The plaintiff

deems it invalid, but the most he can claim is that ['] it is irregular, even though there was no order of the court. If, however, the court had power to make the order it is valid until set aside. The question of jurisdiction in such a case is fully discussed in *Cooley v. Lawrence* (5 *Duer*, 605), where the whole issues depended upon its determination and it was decided that the power was complete. It would

['] seem to be elementary, in view of the accompanying facts which appear in this and kindred cases. If, therefore, the court had power to grant the order, the position of the plaintiff is indefensible in any phase of the case. But aside from this I do not think, as said above, that the provisions of section 421 are in any material respect different from the former practice as would seem to be implied in the decisions above referred to. The body of the notice of appearance was

precisely alike under the former and the present practice. Under the former, rule 10 required that "on all papers served, the attorney, besides subscribing his name, shall add thereto his place of business." This is substantially embodied in section 421 of the

['] Code, and the decisions which apply to the question in its different phases are equally applicable, and certainly a slight variance in that regard would not, in my opinion, make the order wholly void.

Admitting that such an appearance would be voidable under the provision of the code, I think that it

['] had sufficient life to give to the court jurisdiction

Fowler v. Callan.

to make the order, and if so it was sufficient to bind the plaintiff until vacated.

Plaintiff must accept service of the order. No costs to either party.

FOWLER, APPELLANT, v. CALLAN, ET AL.,
RESPONDENTS.

N. Y. COMMON PLEAS, GENERAL TERM,
JANUARY, 1884.

§ 74.

Attorneys.—Champerty.—What constitutes, under 2 R. S. 288, § 72.

Plaintiff, who was an attorney at law, entered into an agreement, by which he promised to render for defendant legal service necessary to secure for him the title to certain premises and to save him from the payment of any costs and expenses in connection therewith, and upon the same date defendant executed and delivered to plaintiff, in advance payment for such services and immunity from expense, quit-claim deed of one half of said premises.

In an action upon the deed to recover possession of the premises so conveyed, after the rendition of the services: *Held*, that the agreement and deed were champertous and void within the spirit of 2 R. S. 288, § 72, in regard to advances of money, etc., by attorneys.

It seems that the law of champerty and maintenance has no existence in this state except as contained in the statutes.*

* The common law definition of champerty is an agreement with a plaintiff or defendant to divide the land (*campum partire*), or other matter sued for, between them, if they prevail at law, and the champertor is to carry on the suit at his own expense. It differed from maintenance in this, that in the latter the person assisting receives no benefit. 4 *Bl. Com.* 135.

Section 72, 2 R. S. 288, 5th ed. (now repealed) was as follows: "No attorney . . . either before or after suit brought, shall lend or advance, or agree to lend or advance, or procure to be lent or advanced any money or any bond, bill of exchange, draft or other

Fowler v. Callan.

Appeal from judgment dismissing the complaint.

This action was brought to recover possession of one undivided half of premises conveyed by a quit claim deed dated May 5, 1865, executed and delivered to the plaintiff, an attorney at law, by the defendant Callan.

thing in action, to any person as an inducement of the placing, or in consideration of having placed in the hands of said attorney, counselor or solicitor or in the hands of any other person, any debt, demand or thing in action for collection." Section 74, Code Civ. Proc., enacted in its place, is substantially the same, the word "lend" being omitted, and "valuable consideration" put in place of "any money or any bond, bill of exchange, draft or other thing in action," and "for the purpose of bringing an action thereon," substituted in place of "for collection."

2 R. S. 288, §§ 71, 73, forbidding purchase of claims, etc., by attorney, and making a violation of such provision or of § 73 (*supra*) a misdemeanor, are also repealed, and §§ 73 and 75 Code Civ. Proc. to the same effect, enacted in their stead.

By § 136 Penal Code, a violation of § 73 or § 74 Code Civ. Proc. is punishable as a misdemeanor.

That the law of champerty and maintenance forms no part of the common law of the state of New York, see *Richardson v. Rowland*, 40 Conn. 565.

The doctrine of *Sedgwick v. Stanton*, 14 N. Y. 289, *Voorhees v. Dorr*, 51 Barb. 580, and other cases holding that nothing of the law of maintenance and champerty remains in this state except as embodied in the statutes relating to attorneys, and to titles to lands, approved in *Courtright v. Burus* (U. S. Circ. Ct. Miss.) 13 Rep. 261; 13 Fed. Rep. 217, as allowing a more liberal policy in regard to contracts between attorney and client. See also *Small v. Mott*, 23 Wend. 403; *Durgin v. Ireland*, 14 N. Y. 322. But an agreement that an attorney shall be paid for his services out of the amount recovered is valid, under § 303, Code Proc. (§ 66, Code Civ. Proc.), provided only there be no agreement by him to bear the expenses thereof. *Benedict v. Stuart*, 23 Barb. 420, and see cases cited above by respondent's counsel. But see *contra*, *Fogerty v. Jordan*, 2 Robt. 319, holding that an agreement made since the Code Proc., by an attorney to commence and carry on a suit for a client, and to "furnish all lawyer's expenses and everything else," is not a violation of 2 R. S. 288, § 71, forbidding an attorney from buying a thing in action for the purpose of bringing suit.

Fowler v. Callan.

The plaintiff under same date delivered to defendant Callan, his agreement to render for said defendant all necessary and requisite legal services to secure him the title to the entire premises and to save him from the payment of any costs and expenses. The deed was given as advance payment for the professional services mentioned in the agreement, and the immunity from charges and expenses. The services were rendered, and involved title to the realty described in the conveyance and agreement.

At the close of the case the court dismissed the complaint, to which plaintiff duly excepted.

N. Hill Fowler and Scott Lord, for appellant.

The complaint was improperly dismissed. Even before the Revised Statutes, when the law against champerty and maintenance was in full effect, many acts in the nature of maintenance were held justifiable and the agreement in this case is not against the statute, though there was a promise to pay expenses. *Voorhees v. Dorr*, 51 *Barb.* 580. This was a contract calculated to induce repose rather than litigation. Plaintiff bound himself to defend, &c. *Benedict v. Stuart*, 23 *Barb.* 420.

The law of champerty and maintenance is not in force in this state, except as contained in our statutes, which do not cover this case. *Sedgwick v. Stanton*, 14 *N. Y.* 289; approved *Howland v. Coffin*, 32 *How.* 307, also in *Zogbaun v. Parker*, 66 *Barb.* 341; *Durgin v. Ireland*, 14 *N. Y.* 322.

The tendency of legislation in this direction is shown by the provisions of the Code, allowing an attorney to make agreement as to his compensation. *Code Proc.* § 303; *Code Civ. Pro.* § 66.

J. Adolphus Kamping, for respondent Callan.

In transactions between attorney and client every

Fowler v. Callan.

presumption is against the attorney. *Hitchings v. Van Brunt*, 38 *N. Y.* 335; *Burling v. King*, 2 *T. & C.* 545; *Whitehead v. Kennedy*, 69 *N. Y.* 462.

The agreement was champertous and therefore the deed based on it was void. Champerty is an offense at common law and is not repealed by the Revised Statutes. *Jackson v. Ketchum*, 8 *Johns.* 482; *Hoyt v. Thompson*, 5 *N. Y.* 320; *Ogden v. Des Arts*, 4 *Duer*, 275. Any agreement to pay part of the sum recovered by commission or otherwise, on consideration either of money advanced to maintain a suit, or services rendered, or information given, or evidence furnished, is champertous. 2 *Pars. Contr.* (5th ed.) 766; *Lathrop v. Amherst Bank*, 9 *Metc.* 489; *Satterlee v. Frazer*, 2 *Sandf.* 141.

Q. McAdam, for respondents Kelly and Griffin.

The deed is based on a consideration forbidden by law and is void. Notwithstanding the provisions of the Code in regard to attorney's compensation, an agreement such as this, to bear the expense of the litigation "and to save his client from the payment of any costs or expenses in relation to the same," is void. *Brotherston v. Consalus*, 26 *How.* 213; *Coughlin v. N. Y. Central & H. R. R. Co.*, 71 *N. Y.* 443.

BEACH, J.—The agreement and the deed were void, the latter being in contravention of the statute then in force (2 *R. S.* 5th ed. 282, § 72). This enactment prohibits an attorney from agreeing to advance money to any person as an inducement to the placing, or in consideration of having placed in his hands any debt, demand or thing in action for collection. It may be questionable whether or not the subject matter of the agreement technically falls within the statutory specifications of "debt, demand or thing in actions for collection." I think "demand" has a meaning broad

Fowler v. Callan.

enough to cover it, and "collection" may be held synonymous with enforcement.

The case of *Voorhees v. Dorr*, 51 *Barb.* 580, seems overruled by *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 *N. Y.* 443, 452. As an original question, the agreement in that case would appear to be for an advance of fifty dollars and expenses to the assignee of the claim, with immunity from costs, as an inducement to place in the defendants hands for collection. But the learned court construed the contract differently, and were it not for the controlling decision in *Coughlin v. R. R. Co.*, *supra*, I should feel constrained to follow the decision.

Legislative enactment, enforced by controlling adjudication, has undoubtedly swept away the law of champerty and maintenance, save an exception contained in the Revised Statutes (*Sedgwick v. Stanton*, 14 *N. Y.* 289; *Durgin v. Ireland*, *Id.* 322).

These decisions seem contrary to the apt and forcible suggestions of Justice BOCKES in *Brotherson v. Consalus*, 26 *How. Pr.* 213, except, that while not authoritative, they are like to cause regret over the absence of statutory enactments preventing attorneys and counselors of the court, from encouraging litigation in any and all cases, by actual loans to litigants or agreements to indemnify them against costs and expenses.

The judgment should be affirmed with costs and disbursements.

VAN BRUNT and VAN HOESEN, JJ., concur.

VOL. IV.—27

Titus v. Fairchild.

TITUS, RESPONDENT, v. FAIRCHILD, APPELLANT.

N. Y. SUPERIOR COURT, GENERAL TERM, MAY, 1883.

§§ 715, 814.

Bond—to officer, when not forbidden by 3 R. S. 448, § 49.—Words of description.—Evidence.—Recitals.—Orders as evidence in suit on receiver's bond.

A bond given under an order, by a receiver to the clerk of the court, conditioned for the performance by the receiver of his duty, does not come under the statute forbidding a sheriff or other officer to take any bond, etc., by color of his office, except such as are provided by law.^[1]

Where the penalty in a receiver's bond is made payable to "J. M. S., clerk of the superior court, etc.," without words showing that the obligee's representatives are to take his rights, and which shows on its face that it is given in pursuance of orders of the court, to secure the performance of the receiver's duty, etc., said bond is not an obligation to J. M. S. individually, but is valid for the purpose for which it is given.^[2]

The party interested, may properly bring an action on such bond, in his own name, after leave of court by order, under § 814, Code Civ. Pro.^[3]

In an action on the bond, the recitals are *prima facie* evidence of the facts set forth.^[4]

Where the bond is that the receiver shall perform his trust and make payments according to order of the court, it is enough to sustain an action against the sureties, to prove orders entered upon notice to the receiver and after he had been heard, directing him to pay a certain sum to plaintiff, and adjudging him in contempt for failure to do so, and plaintiff need not prove that the receiver has funds enough to meet the claim.^[5]

(Decided May 7, 1883.)

Appeal by defendant from a judgment in favor of plaintiff and against the defendant for \$5,618.74,

Titus v. Fairchild.

entered on the verdict of a jury, by the direction of the court.

The facts appear in the opinion.

Arnoux, Ritch & Woodford, for appellant.

The bond is contrary to the statute, and is null and void, if an official bond. 3 *Rev. Stat.* 448, § 49, 6th ed. Any bond taken by any officer by color of his office in any other case than such as are provided by law, is void. *People v. Meighan*, 1 *Hill*, 298; *Webb v. Albertson*, 4 *Barb.* 51; *Bank of Buffalo v. Boughton*, 21 *Wend.* 57; *Webbers v. Blunt*, 19 *Id.* 188; *Sullivan v. Alexander*, 19 *Johns.* 233; *Love v. Palmer*, 7 *Id.* 159. It is a personal bond to James M. Sweeny, the words "to clerk of the superior court" being descriptive of the person, and the action must be by him. *Brockway v. Allen*, 17 *Wend.* 40; *Moss v. Livingston*, 4 *Coms.* 208; *Davis v. Garr*, 2 *Seld.* 124; *Taft v. Brewster*, 9 *Johns.* 334; *De Witt v. Walton*, 9 *N. Y.* 571; *Barker v. Mech. Fire Ins. Co.*, 3 *Wend.* 94; *Hills v. Bannister*, 8 *Cow.* 31; *Pumpelly v. Phelps*, 40 *N. Y.* 59; *Merritt v. Seaman*, 2 *Seld.* 168; *Sutherland v. Carr*, 85 *N. Y.* 105. The law favors sureties. *Ward v. Stahl*, 81 *N. Y.* 406. The bond of a receiver can only be given to the people of the state of New York. The approval of the bond does not make it legal or valid. *Merritt v. Seaman*, 6 *N. Y.* 168; *Austin v. Munro*, 47 *Id.* 360; *Buffalo Catholic Inst. v. Bitter*, 87 *Id.* 250. This is not such a bond as the Code, § 814, contemplates. The orders recited in the bond should have been given in evidence, the recitals in the bond do not prove them. *Germond v. People*, 1 *Hill*, 343; *Cadwell v. Colgate*, 7 *Barb.* 253. Nothing contained in a bond by way of recital will estop a party to it from showing it to be void. *Germond v. People*, *supra*. In all of this class of cases where it has been held that the surety was

Titus v. Fairchild.

bound by orders or decrees that the principal should pay, it was shown that sufficient funds came into his hands to pay with. *Thayer v. Clark*, 4 *Abb. App. Dec.* 391; *Dayton v. Johnston*, 69 *N. Y.* 419; *People v. Hascall*, 22 *Id.* 188; *Casoni v. Jerome*, 58 *Id.* 315; *Thomson v. MacGregor*, 81 *Id.* 592.

George J. Greenfield, for respondent.

The bond was properly made to James M. Sweeney, clerk of the superior court. Section 715, Code Civ. Pro., requiring security to run to the people, was not then in force. *Banks v. Potter*, 21 *How.* 469; 2 *Barb. Ch. Pr.* 522, precedent No. 282; 2 *Wail's Pr.* 239, 240; *Edw. on Rec.* 91, note a, No. 4 of Receiver's Bond, in *High on Rec.* 548. And the bond could be prosecuted upon the application, and for the benefit, of any party interested. 3 *Daniel's Chan. Pr.* 543; 3 *Bulst.* 62; *Banks v. Potter*, *supra*. In any event it was a defect of form only and would not invalidate the bond. *Wiser v. Blachly*, 1 *Johns. Ch.* 607; *Schoharie v. Pindar*, 3 *Lans.* 8, 11; *Farley v. McConnell*, 7 *Lans.* 428-30; *Weaver v. Shryock*, 6 *Serg. & R.* 262, 264; *Prior v. Williams*, 2 *Keyes*, 530; *Sikes v. Territt*, 4 *Jones Eq. [N. C.]* 360; 2 *Rev. Stat.* 556, § 33; *Gerould v. Wilson*, 81 *N. Y.* 573. And having been voluntarily given by defendant, it would be valid as a common-law obligation. *Baker v. Bartol*, 7 *Cal.* 551; *Ring v. Gibbs*, 26 *Wend.* 501; *Burrall v. Acker*, 23 *Wend.* 605; 21 *Wend.* 605; *Adee v. Adee*, 16 *Hun*, 46; *Chamberlain v. Beller*, 18 *N. Y.* 115.

The action was properly brought in name of plaintiff, the real party in interest. § 814, Code Civ. Pro.; *Baggott v. Boulger*, 2 *Duer*, 160-170; *O'Conner v. Such*, 9 *Bosw.* 318; 3 *Daniel's Ch. Pr.* 543. The objection should be taken by demurrer. *Baggott v. Boulger*, 2 *Duer*, 160; *O'Conner v. Such*, 9 *Bosw.* 318, 320.

Titus v. Fairchild.

The recitals were evidence against the surety. *Franklin v. Pendleton*, 3 *Sand.* 572; *Potter v. Merchants' Bank*, 28 *N. Y.* 641; *Scott v. Duncombe*, 49 *Barb.* 73, 84; *Carpenter v. Buttler*, 8 *M. & W.* 209; *People v. Norton*, 9 *N. Y.* 176, 179, 183; *Ransom v. Keyes*, 9 *Cow.* 128; *Allen v. Lockett*, 3 *J. J. Marsh.* 164; *Kellar v. Heclar*, 4 *Id.* 655; *Trimble v. State*, 4 *Blackf.* 435; *Id.* 553; *Cutter v. Dickinson*, 8 *Pick.* 386; *Norton v. Sanders*, 7 *J. J. Marsh.* 12; *Ceil v. Early*, 10 *Gratt.* 198. The evidence established the pendency of the action at the time of and before the making of the orders and execution of the bond. The orders of the court in *Clark v. Binninger*, directing Barr, the receiver, to pay to plaintiff the amount therein stated, and adjudging that said Titus was entitled thereto, and the order adjudging said receiver guilty of contempt for refusal to pay, were conclusive evidence against defendant, the surety, as to the breach of the bond and the amount plaintiff was entitled to recover against him thereon. *Baggott v. Boulger*, 2 *Duer*, 160, 170; *Westervelt v. Smith*, *Id.* 449; *People v. Norton*, 9 *N. Y.* 176, 183; *Scofield v. Churchill*, 72 *Id.* 565; *Thomson v. MacGregor*, 81 *Id.* 592, 597 599, and cases cited; 9 *Abb. N. C.* 138; *Gerould v. Wilson*, 81 *N. Y.* 573; *Thayer v. Clark*, 4 *Abb. App. Dec.* 391; 46 *Barb.* 343; *Casoni v. Jerome*, 58 *N. Y.* 351.

INGRAHAM, J.—This is an action brought to recover the sum of \$4,254.66, from the defendant as one of the sureties on a bond given under and in pursuance of several orders of this court made in an action wherein Abraham B. Clark was plaintiff, and Abraham Binninger was defendant, and conditioned that one of the obligors, Thomas J. Barr, who had been appointed receiver of all debts, property and effects of the copartnership existing between the said Clark and Binninger should “duly account for what he had received or had in charge as co-receiver or for what

Titus v. Fairchild.

he shall have in charge as sole receiver in said action, and shall pay and apply the same as he may from time to time be directed or ordered by said court, and shall faithfully discharge the duties of his trust as such receiver. The bond was joint and several, and was executed by the principal Barr and by Henry Smith, the defendant, as sureties. Henry Smith died before the commencement of this action. The bond provides that the obligors are held, etc., unto James M. Sweeney, clerk of the superior court as aforesaid, for which payment, etc. The bond then recites an order of this court in an action therein pending, made March 27, 1869, whereby Thomas J. Barr, one of the obligors, was appointed an additional or co-receiver with one Daniel H. Hanrahan, receiver, of the property of the copartnership existing between Clark and Binniger; and also an order made April 12, 1870, requiring Hanrahan as receiver, and Barr as co-receiver to execute new bonds in the penalty of \$250,000, for the faithful discharge of their duties as receivers; and providing that in case one of them should fail to give such security, that the other of them who had given such security should be the sole receiver under the original order appointing such receiver; and further reciting that said Hanrahan having failed to give such new bonds, that by an order of the court made April 27, 1870, the said Hanrahan was removed as receiver, and which order directed that the said Barr; if he should comply with the said order of April 12, 1870, should be continued as receiver; and which Barr recited another order dated April 30, 1870, reducing the penalty of the bond to be given to \$100,000.

On the trial, the plaintiff introduced in evidence the bond duly approved as to the form, manner of execution, and sufficiency of securities, by one of the judges of this court; then an order of the special term of this court, made on motion to said Barr, and after hearing counsel on his behalf, dated April 16, 1877,

Titus v. Fairchild.

which ordered and adjudged that plaintiff in this action on June 14, 1870 had a lien upon the property, estate and effects in the possession of the said Barr as receiver to the extent of \$5,237.80, that said Titus is entitled to be paid said sum of \$5,237.80, out of said property, etc., by said Barr, receiver, and that said Thomas J. Barr, receiver as aforesaid, do pay out of said property, estate and effects referred to, and he was thereby directed to pay to said Titus said sum of \$5,237.80, with interest thereon from August 22, 1876, within ten days after the service of a copy of the order. Plaintiff then introduced an order in the said action dated August 7, 1877, reciting the foregoing order; the granting of an order to show cause, why the said Barr should not be punished for contempt in refusing to obey the said order of April 16, 1877, and the said Barr having been heard, ordered and adjudged that said Barr had been and was guilty of a contempt in having willfully disobeyed the said order of April 16, 1877, by refusing to pay plaintiff in this action the said sum of \$5,237.80 with interest from August 22, 1876, less sum of \$1,250, paid on account thereof, which reduced the sum ordered to be paid on account thereof to \$4,254.06, and committing said Barr for contempt, until such amount should be paid; and also an order dated February 18, 1878, authorizing plaintiff to commence an action on the bond. Plaintiff then testified that there was due him the said sum of \$4,254.06, with interest from May 17, 1877.

The court directed a verdict for the plaintiff.

The first objection taken by defendant is that the bond is within the prohibition of the statute that provides that no sheriff or other officer shall take any bond, obligation or security, by color of his office, in any other case or manner except such as are provided by law, such other bond, &c. taken otherwise shall be void. 3 *Rev. Stat.* c. 448, § 49, 6 ed.

Titus v. Fairchild.

It is very evident that the bond in question ['] does not come within the provisions of this statute.

The bond was not one taken by a sheriff or other officer, but was given in pursuance of a judgment or order of a court of equity, as security for the faithful performance of the duty of an officer of the court. The power to require such a bond the court has always possessed and exercised, and a bond given in pursuance of its direction becomes one given in pursuance of law. It was held in *Gerould v. Wilson* (81 *N. Y.* 573), that the statute does not apply to a bond taken in such a case, and all of the cases cited by counsel for the appellant apply to officers who are specially directed by statute to take bonds for their own good and safety, and under certain conditions, and they hold that a bond taken by such an officer that does not follow closely the statute requirements is void. It is evident that such authorities do not apply to a bond given in pursuance of an order or judgment of a court of competent jurisdiction, as a portion of the machinery by which it is enabled to carry into effect its judgment. No provision of law has been cited that restricts this power of the court, and the approval of the bond by one of the judges of the court, adopts it as a compliance with the order.

But a more serious question is presented by the ['] objections taken by the appellant that the bond is an obligation to James M. Sweeney personally, it not being taken to him as clerk of the court, and the penal sum is to be paid to "said James M. Sweeney, clerk of the superior court," and as no assignment by him or his representatives was proved on the trial, plaintiff had no right of action in the bond.

The principal case relied on by the appellant on the argument was the case of *Sutherland v. Carr* (85 *N. Y.* 105). That was an action on a bond given to secure the faithful discharge of the duties of one Marshall,

Titus v. Fairchild.

elected supervisor of the town of White Plains, to a Jackson Hyatt, town clerk of said town, "to be paid to said town clerk, or his successors in office," and the objection was taken in that case that the bond was one to Hyatt individually, and not officially as town clerk, and that the addition of the words "town clerk" to his name was a mere "*descriptio personæ*." The court, however, held that the rule that "where a party to a written instrument is described as executor, administrator or assignee, without introducing any words to show that he intends to act in such capacity, that such phrase is a mere description of the person, is not so rigid a rule" as not to yield to the evident purpose of the instrument; and if there can be plainly gathered from the whole of it, that a particular character or capacity is to be attached to the person named, he will be deemed to hold it in his relation to the transaction. If in a pleading the promise or other obligation or the duties are alleged as those of or to the body that the person named represents, the pleading is looked upon as one for or against that body, "so it must be with an instrument in writing."

This being the rule, its application to the bond in question is not difficult. It will be noticed that no words are used to show that the obligee's representatives are to succeed to his rights; the money is to be paid to the "said James M. Sweeney, clerk of the superior court, aforesaid." The bond then recites the object for which the bond was given. It shows on its face that there was no obligation to James M. Sweeney individually, but that it was given in pursuance of several orders of the court requiring the receiver, before appointed, to give security for the faithful discharge of his duties as such receiver, and the condition of the obligation is not that any act should be done to or by James M. Sweeney, but that the receiver should perform the duties to which he had been ap-

Titus v. Fairchild.

pointed by the court, of which the obligee was in the instrument named in as clerk.

Taking the whole instrument together, it must be apparent that the evident purpose and object of the bond was to secure to the parties interested in the trust, the faithful discharge of the duties of the receiver, and that it was the clerk of the court who was the obligee, and not James M. Sweeney, the individual in his own right.

When this action was commenced, viz., September 1878, section 814 of the Code of Civil Procedure ['] was in force, and an order granting plaintiff leave to bring the action was all that was necessary to give plaintiff the right to sue. The bond having been a valid bond, and having been made to the clerk of the court, the recitals in the bonds of the pendency of ['] the action in which the receiver was appointed, and the regularity of the appointment, was at any rate "*prima facie*" evidence of the facts therein recited.

The only other question that requires attention ['] is, whether the order of the court directing the receiver to pay and adjudging him guilty of contempt is sufficient to sustain the action, without proof that there was sufficient funds in the receiver's hands, the property of the co-partnership, to pay the amount due plaintiff.

It will be noticed that the conditions of the obligations are not only that the receiver will faithfully discharge the duties of the trust, but "that he will pay and apply the same (viz., what he had theretofore received as co-receiver, or what he shall receive or have in charge as such sole receiver) as he may from time to time be directed by the court."

In *Schofield v. Churchill* (72 N. Y. 165), the bond was one given by an executor, and was conditioned that the executor should faithfully execute the trust reposed in him as executor, and also obey all orders of

Titus v. Fairchild.

the surrogate, etc. And it was held that the surrogate makes an order that the executor pay over money to a legatee, a breach of the conditions has occurred within the letter of the bond, and the positive undertaking of the sureties had become fixed and operative by the surrogate's decree, and in the absence of fraud or collusion, the decree of the surrogate is conclusive upon the sureties.

The conditions here are that the receiver shall account for what he has received and for what he shall receive, and shall pay the same by order of the court. The orders on notice to the receiver adjudge that he shall pay to plaintiff a portion of what he has received, and subsequently adjudge that he has not obeyed the order and was in contempt. The orders were all made on notice to the receiver and after he had been heard. I think they were conclusive upon the principal and sureties alike. That the principal having failed to obey the order to pay, the conditions were broken and the obligations were in full force and effect. There can be no doubt of the power of the court to make the order directing its officer to pay property in his possession, and when such an order, is made and the principal refuses to pay, he has not only disobeyed the order, but has failed to faithfully execute the trust, and then there has been a twofold breach of the condition of the bond. *Gerould v. Wilson*, 81 *N. Y.* 573.

The order of April 16, 1877, adjudged that plaintiff had a lien on the property of said firm in the hands of said Barr, receiver, and orders the said Barr, as such receiver, to pay the said sum. That being an adjudication that said Barr had property of the copartnership in his hand and orders him to pay, that adjudication is conclusive against the receiver, and the sureties on the bond, having made themselves privy to the proceedings against their principal, are, without fraud or

Luce v. Alexander.

collusion, concluded when their principal is concluded.
Gerould v. Wilson, *supra*.

I am of the opinion that the judgment appealed from was right and should be affirmed with costs.

SEDGWICK, Ch. J., and O'GORMAN, J., concur.

LUCE, RESPONDENT, v. ALEXANDER, ET. AL.,
APPELLANTS.

N. Y. SUPERIOR COURT, GENERAL TERM, MAY. 1883.

§§ 500, 1204, 1205.

*Bond—liability of parties when discharged—complaint on—Pleading—
denial when insufficient.*

A denial as follows: "Defendant denies each and every allegation in said complaint contained, not herein-before specifically admitted or denied, does not raise an issue." [2]

Where a bond is given upon opening a default, executed by the defendants against whom judgment was taken and sureties, and is conditioned for "the payment of any judgment which plaintiff may recover, etc., and two judgments are rendered, one against all of the defendants for a certain sum, and another against one of the defendants for a larger amount, payment of said judgment recovered against all of the defendants does not release the parties executing the bond from their liability thereon as to the remaining judgment. [1]

It is not necessary that the complaint should show that plaintiff has exhausted his remedy against the principal. [2]

(Decided May 9, 1883.)

Appeal from a judgment against the defendants, entered March 21, 1882, for \$1,202.62, damages and costs, and from an order denying a motion for a new trial.

Luce v. Alexander.

The answer, after certain specific denials, contained the following clause :

“Further answering, defendants deny each and every allegation in said complaint contained, not hereinbefore specifically admitted or denied.”

The bond upon which this action was brought was given upon the opening of a default taken in an action by the present plaintiff against certain of the present defendants, and the condition thereof was that the parties executing it, should “well and truly pay, or caused to be paid, unto the above-named Thomas Luce or his certain attorney, executors, administrators or assigns, any judgment he may recover in said action, without fraud or delay.”

Further facts and the exceptions appear in the opinion.

Joseph E Newburger, for appellant.

Charles N. Judson, for respondent.

O'GORMAN, J.—It is averred by the plaintiff in his complaint and expressly admitted, or not sufficiently denied by the defendants, that on January 23, 1879, they duly executed jointly and severally a bond under seal whereby they obliged themselves to pay to the plaintiff any judgment that he might receive in an action then pending in the court, wherein said Thomas Luce was plaintiff, and John C. Morrison, Theobald Frohwein, Julius D. Alexander, and Magnus D. Alexander were defendants; that all the conditions and terms of said bond on the part of the plaintiff were duly performed; and that the plaintiff did, on December 14, 1880, recover in said action, judgment against said John C. Morrison for the sum of \$1,118.95, being the amount of a verdict against him with interest, and costs, and against said John C. Morrison, Theobald

Luce v. Alexander.

Frohwein, Magnus D. Alexander, and Julius D. Alexander, for the sum of \$388.84, being the amount of the verdict against them in said action, with interest and costs; that the sum of \$388.84, with interest was paid to plaintiff on January 26, 1881, leaving the amount \$1,018.95, due and unpaid. The defendants, Magnus D. Alexander, and Julius D. Alexander, in their answer, admit these allegations of the complaint, but deny that there was a valuable consideration for the bond, and allege that the said judgment was discharged by satisfaction on, or about March 7, 1881; and also that the said judgment was improperly granted and without warrant of law.

The plaintiff's counsel, at the trial of this action, put in evidence the bond of the defendants, and after proving interest, rested his case. The defendant's counsel thereupon moved for dismissal of the complaint, which motion was denied, and he duly excepted. He then put in evidence a document executed by the plaintiff's attorney, in which (after setting forth the rendition of a judgment in said action on December 21, 1880, in favor of plaintiff against the defendant Morrison for \$1,018.95, and against the other defendants therein for \$388.84), he acknowledged payment of the sum of \$388.84, being the part so recovered against said Morrison, Frohwein, Magnus D. Alexander, and Julius D. Alexander. Defendants' counsel also put in evidence the record showing satisfaction of said judgment in the sum of \$388.84, on March 7, 1881, and then rested his case. The action was tried by consent by the learned chief judge of this court without a jury, and he adjudged that the plaintiff was entitled to payment in the sum of \$1,018.95, with costs and allowances.

The objections of the defendants' counsel, as presented in his request to charge, and exceptions, and relied on in his printed points, are as follows:

Luce v. Alexander.

1. That the bond sued on is without consideration, and void. This objection is not tenable. The plaintiff, in his complaint, has alleged that the bond was executed by defendant for a valuable consideration. Sufficient consideration for the execution of a sealed instrument will be presumed, in the absence of evidence to the contrary. No such evidence appears in this case. 2. That payment of part of the judgment discharges the sureties on the bond. The case cited by the counsel for the defendants (*Woods v. Pangburn*, 75 *N. Y.* 495), is not in point, and does not sustain ['] defendants' objection. Sections 1204-5 of the Code of Civil Procedure allow judgment to be given for or against one or more plaintiffs, and for or against one or more defendants, etc., and the court may render judgment against one or more defendants, and direct that the action proceed against the others. There is no authority for the position that payment by one defendant of the amount for which he is adjudged to be alone liable, is a discharge of the judgment against other defendants, adjudged to be liable in another sum. 3. Defendants further claim that no action can be sustained against the sureties, unless it appears ['] by the complaint, that plaintiff has exhausted his remedies as against the principal. This is matter of defense, and should have been set up by the defendants in their answer. The opinion of Judge FOLGER in *Colgrove v. Tallman* (67 *N. Y.* 95), does not sustain the contention of defendants' counsel. In that case, it appeared in evidence that the defendant, Tallman, had sold out his interest in a partnership to one Barnes, who agreed to pay the firm's debts. Tallman soon afterward notified the plaintiff, who then held an overdue note made by the firm, of his agreement, and requested him to collect it, which plaintiff failed to do. The court held that Tallman was by virtue of his agreement, in the position of surety for Barnes, and that

Luce v. Alexander.

the delay of the plaintiff to see Barnes, on receiving notice from defendant, and defendant's request that he should collect the note from Barnes, released the defendant. There is no *dictum* in the opinion of Judge FOLGER, and no suggestion in the argument of the counsel in that case, that the plaintiff was bound in his complaint to negative the charge of negligence, which was the defendants' ground of defense.

It should be noticed that the allegations in the ['] plaintiff's complaint, that all the conditions, e'tc., on his part had been duly complied with, etc., is not denied by the defendants in their answer. The form of denial is incorrect and insufficient (*Code Civ. Pro.* § 500; *Miller v. McCloskey*, 1 *N. Y. Civ. Pro.* 252, and notes).

The defendants' objection that the judgment was invalid and improperly obtained, is not tenable. The validity of a judgment cannot be thus impeached collaterally.

The remaining objections presented by the learned counsel for the defendants, are overruled.

The judgment is affirmed with costs, and the order appealed from is affirmed, with \$10 costs.

TRUAX, J., concurs.

Smith v. Crissey.

SMITH v. CRISSEY.

SUPREME COURT, THIRD DEPARTMENT, ALBANY
COUNTY, SPECIAL TERM, FEBRUARY, 1883.

§ 448.

Parties defendant.—Persons claiming money necessary, in action against officer of municipal corporation to restrain its payment.—Law of 1881, chap. 581, does not affect this rule.

In an action to restrain the comptroller of a city from countersigning or paying any draft or drafts drawn for the payment of a certain police force, which was one of two police forces claiming to be the legal force of the city, an injunction so restraining such comptroller will not be granted when the parties claiming the moneys are not parties to the action.[¹, ², ³] If such relief was granted they would be deprived of what they claim to be their property without having their day in court,[²] and no judgment can be rendered depriving a person of what he claims to be his, without bringing him before the court which is asked to determine his rights.[¹]

Chapter 581 of the Laws of 1881, which allows a taxpayer to bring an action against a public officer to prevent a waste of funds or property belonging to a municipal corporation, does not dispense with the necessity of making persons having claims against a city or some representative of them parties to an action to adjudge such claims invalid.[⁴]

(Decided February, 1883.)

Motion by defendant to dissolve an injunction restraining the comptroller of the city of Troy from countersigning, &c., certain drafts.

The opinion states the facts.

R. A. Parmenter, for the motion.

Merritt & Ryan, opposed.

WESTBROOK, J.—The injunction which this motion seeks to vacate restrains the defendant, as comptroller

Smith v. Crissey.

of the city of Troy, "from countersigning any draft or drafts drawn by Michael Cavanaugh and Edward Hannan for the payment of any police force in said city over which John McKenna claims to be superintendent, or from countersigning any draft or drafts, for the payment of any police force, which are not drawn by a majority of the board of police commissioners;" and the complaint in the action demands a judgment awarding a permanent injunction of a like character, "and for the costs of this action."

When this action was commenced, and when the motion to dissolve the injunction was argued and submitted, there were in the city of Troy two police forces, each claiming to be the legal force of the city. The object of the action was to restrain the payment for services to the members of one force, and to procure a permanent judgment therein declaring that such force was not legal, and that no member thereof should ever obtain compensation for his services. In other words, without giving the parties who were to be affected by the relief sought an opportunity to be heard, this court was asked temporarily and permanently to enjoin the payment to them, and each of them, of moneys which each and all claimed to be legally due. It is true, that since the submission of this motion, the court of appeals, in *People ex rel. Woods v. Crissey* (91 N. Y. 616), has settled the question between the two forces, and determined it against the one which the plaintiff in this suit claims to be illegal; but that decision does not dispose of one question which both this motion and suit present, and that is: Can an action which seeks to enjoin payment of money to individuals be maintained without making them parties to it?

The answer to the question propounded does not seem to be difficult. He who is deprived of his ['] property, or of what he claims to be his, is entitled

Smith v. Crissey.

to be heard, and no judgment can be rendered depriving him of that which he claims to be his, without bringing him before the court which is asked to determine his rights. The Code of Civ. Pro. (§ 447) has accordingly provided, "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party defendant for the complete determination or settlement of a question involved therein;" and when the parties are too numerous to be all united, it has (§ 448) further declared: "One or more may sue or defend for the benefit of all."

It is apparent, if the relief asked by the complainant in this action be granted, that many individuals will be deprived of what they claim to be their property without having their day in court. The comptroller of the city of Troy, who is the sole defendant in the action, has no interest whatever in the result. If the judgment demanded by the plaintiff be rendered, he sustains no loss, but it will fall upon others who have not been brought before the court, and have never been heard in the assertion of their supposed rights. Such a result would be a reproach to the administration of justice, and the maintenance of the legal principle leading to it would be most disastrous in its consequences.

It is argued, however, that the act of 1881 *allows a taxpayer to bring an action against a public officer to prevent the waste of funds or property belonging to a municipal corporation, and that therefore this action, which seeks to prevent the payment of that which is not due, is maintainable. It is true that the act referred to justifies the action as against the comptroller, but it has not declared that to obtain the entire relief such officer is the only neces-

* Laws of 1881, chap. 531.

Smith v. Crissey.

sary party. There are cases in which the officer may be the only necessary party, but in this, which seeks to adjudge and declare illegal and unjust, claims held by numerous individuals, against the city of Troy, the persons holding such claims, or some representatives of them, as required by section 448 of the Code, are necessary parties.

There are other objections to the maintenance of this injunction and action (see opinion in *Tappan v. same defendant*; also, *Morris v. Whelan*, 64 *How. Pr.* 109), but they will not be considered. It seems to me to be a clear legal impossibility to decide and adjudge that persons holding claims against another can, by a direct judgment, be deprived of them without their being brought before the court. It is true that in an action between some individuals a court, in deciding matters which affect them, may establish principles and decide questions which affect others also, but neither this court, nor any court, can legally decide that an action which has for its direct object the forfeiture of the property or rights of an individual, is maintainable without bringing before it as a party the individual at whom and at whose right and property such action is directly aimed. This action is one of the character just described. The judgment asked, directly and sharply, and not incidentally or collaterally, will affect, if rendered, persons not before the court; and before it can be granted, or the injunction maintained, such persons must be made parties, or at least some of them (if they be very numerous), as required by section 448 of the Code.

The motion to dissolve the injunction must be granted. The order to be entered, in consequence of the decision of the court of appeals, to which allusion has been made, will probably be of no practical effect, as the defendant, in his official action, will doubtless conform himself to it, and to its results. The fact,

CIVIL PROCEDURE REPORTS.

Morrison v. Lewis.

however, that the plaintiff is right in his allegation to which is the legal police force of the city of T will not justify this court in maintaining an injunction or rendering a judgment, against persons not parties to the action, and over whom it has no jurisdiction because they have not been legally required to appear in the assertion of their rights.

MORRISON, ET AL., RESPONDENTS, v. LEWIS
RECEIVER, &C., APPELLANT.

N. Y. SUPERIOR COURT, GENERAL TERM, APRIL,

§§ 481, 1720.

*False representations.—Replevin.—Pleading.—Allegations of own
and of intent to deceive.*

In an action to recover personal property claimed to have obtained upon credit by false representations, where the complaint shows that plaintiffs sold and delivered the goods to defendant that in consequence of the fraud therein duly alleged, they seek to avoid the contract of sale, the complaint sufficiently alleges special property in the goods and a right to their possession, § 1720, Code Civ. Pro. [1]

It seems, that the ownership of the property should be implied from the allegation of sale and delivery. [2]

It is enough that the allegation that the false representations were made with intent to deceive and defraud, etc., can be fairly inferred from all the averments of the pleading. [2]

Accordingly, where the false representations were alleged to have been made to a commercial agency with intent "to obtain credit and to induce merchants and others to sell goods to them," and defendants knew the statements were false and untrue, etc.,—no demurrer, sufficient.

(Decided April 9, 1883).

Morrison v. Lewis.

Appeal by defendant from judgment entered on order of special term overruling demurrer to the complaint, and ordering judgment for plaintiff.

The action was to recover possession of certain goods obtained from plaintiff upon false representations, made to a commercial agency.

The facts appear in the opinion.

John J. Adams, for appellant.

Dewitt C. Brown, for respondents.

INGRAHAM, J.—The complaint alleges that the plaintiff, relying on certain representations made by defendants Hunt & Warren, sold and delivered to said Hunt & Warren as co-partners, certain goods and merchandise particularly described, which were of the value of \$246.96; that said representations were false; that subsequently said Hunt & Warren made a general assignment for the benefit of creditors; that the assignee was removed by an order of the superior court and the defendant Lewis was appointed receiver of the property assigned by said assignment; that Lewis had qualified as such receiver and took possession of the property so assigned, and was in possession of the property described in the complaint. The complaint demands judgment for the possession of said goods and chattels and damages for their detention.

Defendant Lewis demurs on the ground that the complaint does not state facts sufficient to constitute a cause of action against him.

The special term ordered judgment for the plaintiff on the demurrer, and judgment was entered in favor of the plaintiff and against the defendant Lewis for the possession of the property therein described with costs. From that judgment defendant Lewis appeals.

The first defect in the complaint on which plaintiff

Morrison v. Lewis.

relies to sustain the demurrer is, that there is no allegation in the complaint that the specific property sought to be recovered is or was the property of the plaintiff, or that plaintiff was the owner thereof, the only allegation being that plaintiff sold and delivered to defendants goods, etc., and the question to be determined is whether this is a sufficient allegation of plaintiff, ownership of the property.

The Code of Civil Procedure (§ 1720) provides how in an action for claim and delivery of personal property title shall be stated in the pleadings, and it is there stated that an "allegation to the effect that the party pleading or a third person, was at the time when the action was commenced or the chattel was replevied, as the case may be, the owner of the chattel, or that it was then his property, is a sufficient statement of title, unless the right of action . . . rests upon the right of possession by virtue of a special property, in which case the pleading must set forth the facts upon which the special property depends, so as to show, etc., that the party pleading was entitled to the possession of the chattels."

I think the pleader has in this case complied ['] with the provisions of this section. He alleges that plaintiff sold and delivered the goods to defendants, and in consequence of fraud asks to avoid the contract of sale and be placed in the same position that he was before the property was obtained from him by the fraud. The demurrer admits that plaintiff sold and delivered the goods; that the sale was induced by fraud; and that the goods are in possession of defendant Lewis. This is sufficient to show that the plaintiff has a special property in the property described, and is sufficient to enable him to maintain this action. The delivery of the property was part of a contract that was fraudulent. Plaintiff asks to have that contract rescinded and is entitled to have it rescinded. In

Morrison v. Lewis.

order to completely rescind it, it is necessary to redeliver the property to the plaintiff.

The cases cited by appellant do not conflict with this view. In *Patterson v. Adams* (7 *Hill*, 126), the complaint alleged that plaintiffs were entitled to the possession of the property. It was "held that this was not sufficient, as in pleading his right the fact must be alleged and not the conclusion." In *Scofield v. Whitelegge* (49 *N. Y.* 259), the complaint alleged "that defendant had become possessed of and wrongfully detained from plaintiff." It was "held that the allegation that the property has wrongfully detained was a conclusion to be drawn from the fact of the ownership or right to possession, and that the fact must be alleged in the complaint, and not the conclusion. In this case it is the fact of the sale and delivery that is alleged, and that having been induced by fraud gives plaintiff a right to have it rescinded.

I think also that ownership of the property ['] should be implied from the allegations of sale and delivery. Possession of personal property alone and without explanation is evidence of ownership. *Rawley v. Brown* (71 *N. Y.* 89).

In an action to recover the value of property sold and delivered no allegation of ownership is necessary. The fact of the sale and delivery of the goods implies that the goods belong to the seller (*Phillips v. Bartlett*, 9 *Bosw.* 678). There is no reason why the same implication should not apply in this case.

The second ground on which it is claimed that the demurrer should be sustained is that complaint does not allege that the statement was made with intent to defraud. The complaint alleges that the representations were made for the purposing of securing credit to defendants Hunt & Warren, and to induce merchants to extend credit and sell goods to them, and that such representations were false, and were known

Estate of Bogert.

to defendants to be false at the time they were made and when the goods were sold.

In the case of *Zabriskie v. Smith* (13 *N. Y.* 322) ['] the court says, "it is sufficient, however, that the requisite allegations (viz. that the false representations were made with an intention to deceive and defraud plaintiff) can be fairly gathered from all the averments in the complaint."

The averments in this complaint come within this rule and make out the allegation of bad faith and intent to defraud. The representations are alleged to have been made with intent to obtain credit and to induce merchants and others to sell goods to them, when they knew the statements were false and untrue. There could be but one motive, and that would be to defraud the persons trusting them in the faith of such representations.

The judgment appealed from should be affirmed with costs.

SEDGWICK, Ch. J., and O'GORMAN, J., concur.

ESTATE OF WILLIAM S. BOGERT, DECEASED.

SURROGATE'S COURT, KINGS COUNTY, FEBRUARY, 1884.

§§ 2611, 2618, 2623.

Probate of will. — Testimony of subscribing witness in proceedings for, not controlling. — Will not be invalidated by absence of or defect in attestation clause. — Proponent not bound by testimony of subscribing witness to will.

The question of the due execution of a will is to be determined, like any other fact, in view of all the legitimate evidence in the case and no controlling effect is to be given to the testimony of the subscribing witnesses.['] If the person executing the will is shown to be familiar with the law upon the subject, the presump-

Estate of Bogert.

tion that the formalities have been observed is very strong and should the testimony of a subscribing witness amount to a positive denial, the relative weight of the conflicting proof would then depend upon the apparent integrity and intelligence of the witness and the circumstances surrounding the particular case.^[7]

While the general rule undoubtedly is that an uncontradicted witness must be believed, when his testimony is improbable or he is interested or where he is impeached the court or jury is not bound blindly to adopt his testimony as true, ^[4] and where a party in a civil action deliberately swears false to one material part of his testimony and the jury are satisfied that he has so sworn falsely intentionally they are not only at liberty but it is sometimes their duty to reject the whole, for the maxim is "*falsus in uno falsus in omnibus*."^[5]

Where in proceedings to probate an alleged last will and testament it appeared that the deceased signed the paper propounded, which was in his own handwriting, and acknowledged the signature to be his; that he declared the instrument to be his last will and testament, and requested one witness, G., to become a witness thereto; that subsequently he requested the witness F. to sign "as a witness," but, according to F.'s testimony, without either acknowledging the signature or declaring it to be his will; that the testator was familiar with the requisite formalities attending the execution of a will and that the witness F., who was a man of more than ordinary intelligence was interested in the estate, and his testimony was not in all particulars true, and the attestation clause to the will was faulty in that it omitted to state that the witness signed at the request of the testator: *Held*, that the instrument was properly executed and should be admitted to probate; ^[7] that the attestation clause was sufficient as a declaration that it was his will,^[2] and that as when F. was requested to become a witness the signature of the deceased was in full view, there was a sufficient acknowledgment of the testator's signature.^[8]

The fact that there is no attestation clause to a paper offered for probate as a last will and testament or that the attestation clause is faulty or incomplete will not prevent its being admitted to probate.^[6,15] The cases on the subject reviewed.^[6,12]

Where the law obliges one to call a witness he may impeach him,^[16] accordingly, *Held*, that the fact that the proponent of an alleged last will and testament had called a subscribing witness to the will as a witness, did not preclude him from asking a finding in opposition to the uncontradicted testimony of such witness.^[16]

(Decided February 21, 1884.)

Estate of Bogert.

Proceedings for the probate of an alleged last will and testament.

Rufus T. Griggs & M. J. McKenna, for proponent.

Eastman & Garretson for *Sarah D. Conselyea* and others, contestants.

Scoville & Dewitt for *Charles W. Bogert* and others, contestants.

BERGEN, Surrogate.—The evidence in these proceedings shows, the deceased signed the paper propounded, and acknowledged the signature to be his; declared the instrument to be his last will and testament, and requested the witness, Gray, to become a witness thereto; that subsequently he requested the witness, Fowler, to sign "as a witness," but according to his testimony, without either acknowledging the signature, or declaring it to be his will.

The question before me is, whether the instrument has been sufficiently proved to authorize its being admitted to probate?

The statute provides that the testator shall sign in the presence of the witnesses, or acknowledge the signature to be his, and declare the instrument to be his last will and testament.*

The attestation clause is faulty in that it omits to state that the witnesses signed at the request of the testator.

Now, in view of this, is it competent for this court to admit the paper to probate?

The testator is shown to be familiar with the requisite formalities attending the execution of a will, for they were observed at the time Mr. Gray became a witness, as testified to by him, and this was previous to Fowler becoming a witness.

* 2 R. S. 63, § 40.

Estate of Bogert.

“The result of the authorities upon the probate of wills is that the question of the due execution ['] of a will is to be determined, like any other fact, in view of all the legitimate evidence in the case and that no controlling effect is to be given to the testimony of the subscribing witnesses” (Orser v. Orser, 24 N. Y. 52). And if the person executing the will ['] is shown to be familiar with the law upon the subject, the presumption that the formalities have been observed is very strong; and should the testimony of a subscribing witness amount to a positive denial, the relative weight of the conflicting proof would then depend upon the apparent integrity and intelligence of the witness and the circumstances surrounding the particular case (Orser v. Orser, 24 N. Y. 53, 54).

Fowler's testimony should be carefully scrutinized; —he is an interested party—the manner of giving and its matter are such as to lead me to conclude that he cannot, in this matter, be relied upon. The maxim, “*falsus in uno falsus in omnibus*” applies with unusual force. He is a party to these proceedings and, though a man of more than ordinary intelligence, says he does not know whether or not he is interested, or whether he will be benefited by the instrument being rejected: a statement unworthy of credence. There are other portions equally improbable and unworthy of belief. I therefore do not think it should be considered in determining the question. When a party in a civil action deliberately swears false to one material part of his testimony, and the jury are satisfied that ['] he has so sworn falsely, intentionally false, they are not only at liberty, but it is sometimes the duty of the jury, to reject the whole. The maxim is “*falsus in uno falsus in omnibus*” (Moett v. People, 85 N. Y. 373).

Though, undoubtedly, the general rule is, that ['] an uncontradicted witness must be believed, it is

Estate of Bogert.

subject to the qualification, that when his testimony is improbable, or he is interested, or where he is impeached, the court or jury is not bound blindly to adopt his testimony as true. *Elwood v. Western Union Telegraph Co.*, 45 *N. Y.* 553; *Gildersleeve v. Landon*, 73 *N. Y.* 609; *Moett v. People*, *supra*; *McNulty v. Hurd*, 86 *N. Y.* 547.

In *Orser v. Orser* (*supra*), there was an attestation clause, one witness was dead and the other testified to facts which negatived the contention that the proper formalities had been observed, yet the court said the jury were at liberty to find the proper execution of the instrument. It is true that there was a full attestation clause, and, therefore, the question remains, whether or not there is a presumption from the circumstances.

The attestation clause is sufficient as a declaration that it is his will, and the sole question is, whether or not I can conclude there was an acknowledgment of his signature. Even under *Mitchell v. Mitchell* (77 *N. Y.* 596, affirming 16 *Hun*, 97), an acknowledgment was here proved. When Fowler was requested to become a witness the signature of the deceased was, he said, in full view, that circumstance was there conceded by the court to be sufficient.

The case was distinguished from *Baskin v. Baskin* (48 *Barb.* 200) affirmed in court of appeals, 36 *N. Y.* 416, where that was held a sufficient acknowledgment under the statute.

In *Hands v. James* (1 *Comyn*, [Eng. King's Bench] 531), the court said, "An attestation clause is not required by the statute, and whether inserted or not, it must be proved. If inserted, it does not conclude, but it may be proved *contra*; then if not conclusive when inserted, the omission does not conclude it was not so, and therefore, must be proved by the best proof which the nature of the thing will admit."

Estate of Bogert.

Again, in *Croft v. Pawlet* (2 *Strange* [Eng. King's Bench] 1109), the attestation clause was defective in that it did not state a signing in the presence of the testator. The court held, it was evidence to be left to a jury of a compliance with all the conditions, and a verdict was given for the will.

In *Brice v. Smith* (*Willes* [Eng. C. P.] 1), the witnesses were both dead and the attestation clause was defective in not stating, that the instrument had been signed by the witnesses in the presence of the testator. The court held the will was well proved, relying upon *Hands v. James* (*supra*).

Chancellor WALWORTH in *Chaffee v. Baptist Missionary Convention* (10 *Paige*, 90) says: "Indeed it has been decided, that a formality of this kind not noticed in the attestation clause may even be presumed from circumstances after the witnesses to the will are dead," citing *Croft v. Pawlet* (*supra*); *Brice v. Smith* (*supra*); and *Hands v. James* (*supra*).

The circumstances here relied upon are, that the testator was familiar with the requisite formalities (*Orser v. Orser*, *supra*); knew its contents and character (*Gibert v. Knox*, 52 *N. Y.* 125); the will was in handwriting of the testator. Since January 1, 1838, when the present English statute of wills took effect, the courts have had to consider the question now before me. I do not apprehend there is any difference in the force of an attestation clause under their law from that under ours. It is true their statute declares no formal attestation necessary, a declaration which coincides with the construction of our own legislation upon the subject. Their statute, as ours, prescribes certain formalities, and any presumption that is available in their courts can be indulged in by us. *In re Seagram* (3 *Notes of Cases* [Eng. Ecc. & Mar. Cts.] 486), there was no attestation clause, the will was admitted though the witnesses were dead.

Estate of Bogert.

The same *In re Johnston* (2 *Curteis* [Ecc.] 341). The same in *In re Luffman* (5 *Notes of Cases*, [Eng. ["] Ecc. & Mar. Cts.] 183), where the attestation was defective and the whereabouts of the witnesses unknown.

In *Leech v. Bates* (6 *Id.* 699) two codicils purported to be signed by the testator and attested respectively by witnesses, the clause of attestation being imperfect, one witness deposed to facts, which if true, would show that the statute had not been complied with, but circumstances proved that his recollection could not be relied upon. Held, as positive affirmative evidence was necessary, the presumption from the circumstances was that the proper formalities had been observed. And in *Wright v. Rogers* ["] (*L. R.* 1 *Prob. & Div.* 678), the same was held where one of the subscribing witnesses was dead, and the other testified that the witnesses did not sign in the presence of the testator

There is an additional question to be examined, and that is, whether in view of the circumstances that the witness, Fowler, was produced upon the part of the proponent, the rule applies, that as he was presented as a credible witness the proponent cannot ask for a finding in opposition to his uncontradicted testimony.

Under section 2618 of the Code of Civil Procedure ["] the proponent was bound to examine this witness to the will. He was competent to testify on direct examination (*Trustees of Auburn Seminary v. Calhoun*, 25 *N. Y.* 425), though not upon the part of the contestants, as to transactions with the deceased. Where the law obliges one to call a witness he may be impeached (1 *Greenleaf on Evidence*, 443), and a party is at liberty to contradict the testimony of his own witness, though indirectly he may be impeached thereby (*Ib.*).

Godfrey v. Pell.

Here the testimony of this witness is not sufficient to overthrow the presumption arising from the circumstances. I do not, therefore, think this forms any objection to the conclusion to which I have arrived, ['] which is, that the instrument was properly executed and should be admitted to probate.

GODFREY, AS ADMINISTRATOR, &C., RESPONDENT v.
PELL, APPELLANT.

N. Y. SUPERIOR COURT, GENERAL TERM, MAY, 1883.

§ 599.

Order of arrest—Jurisdiction—Undertaking.—Irregularity, how waived.

It seems that the failure to require from the plaintiff on granting an order of arrest an undertaking in an amount at least equal to one-tenth of the bail demanded by the order as required by § 599, Code Civ. Pro., is an error, which makes the order void for want of jurisdiction.

But such error is waived and cured where after arrest, defendant, by order to show cause, claims relief in the alternative, either that the order be vacated and set aside on the merits and for irregularity (which is not specified, as required by rule 37), or that the amount of bail required in said order be reduced, upon which application the bail is reduced to an amount bringing the plaintiff's undertaking within the requirements of § 599, Code Civ. Pro.

(Decided May 9, 1883.)

Appeal from an order denying defendant's motion to vacate an order of arrest.

James M. Fiske, for appellant.

Felix T. Murphy, and *E. D. McCarthy*, for respondent.

Godfrey v. Pell.

O'GORMAN, J.—So far as the merits of this case are concerned, and on the facts as they appear in the affidavits and papers used on the motion, this court holds that there was enough to justify the order of arrest.

A question, however, has been raised on the argument whether the learned judge who granted the order of arrest did not err in failing to require from the plaintiff an undertaking in an amount at least equal to one-tenth of the amount of bail required by the order, in compliance with section 599 of the Code, and whether such error rendered the order of arrest void for want of jurisdiction.

The amount of bail required was \$6,000, whereas the amount of plaintiff's undertaking was \$250.

The defendant's order to show cause on which the order appealed from was granted, claimed relief in the alternative, either that the order of arrest should be vacated and set aside for irregularity and on its merits, *or that the amount of bail required in said order be reduced.* The learned judge by his order did reduce the amount of bail from \$6,000 to \$2,500.

We fully concur in the opinion of Judge LAWRENCE, in the case of *Southern Navigation Co. v. Sherwin* (1 *N. Y. Civ. Pro.* 46), cited by counsel for the defendant here, "that the liberty of the citizen is of quite as much importance as the preservation or security of his property, and that the provisions of the Code should be as strictly construed in cases of arrest as in case of attachment."

The defendant in the case at bar, however, has in his order to show cause, complained of the defect, not as going to the jurisdiction of the court to grant the order of arrest, but only as an *irregularity*; and he has failed to specify in his order to show cause the the irregularity complained of as required by rule of court 37.

The order appealed from is in compliance with one

Godfrey v. Pell.

of the prayers of his order to show cause, to wit, that the amount of bail be reduced; and from that part of the order, no appeal has been taken.

The defendant's objection as to the insufficient amount of the plaintiff's undertaking, has in our judgment been waived by the defendant, and cured by the court.

The amount of defendant's bail having at the instance of defendant been reduced, the amount of the plaintiff's undertaking is sufficient.

The order appealed from is affirmed, with \$10 costs.

SEDGWICK, Ch. J., and INGRAHAM, J., concurred.

INDEX.

	Page
ABATEMENT —See ACTION .	
ACCOUNT —Payments on, go in extinguishment of the debt...	311
—Rule as to pleading, and failure to serve copy, does not apply to reference of claim against executor, &c.,	398
ACKNOWLEDGMENT —See ADMINISTRATION , LETTERS TESTAMENTARY AND OF ; ARBITRATION .	
ACTION —When action did not abate by the death of the defendant both parties have an absolute right to a continuance.....	78
—The presenting of a claim to an executor and agreeing to refer it, without naming a referee, does not bar the continuance against the executor of an action on said claim began against the decedent before his death.....	78
—In case of a transfer of interest, an action may be continued by the original party.....	76
—The granting of an order substituting the person to whom the interest was transferred is in the discretion of the court...	76
—See DISCONTINUANCE ; PRISONER ; SECURITY FOR COSTS .	
ADMINISTRATOR —See EXECUTOR AND ADMINISTRATOR ; SURROGATE .	
ADMINISTRATION — LETTERS TESTAMENTARY AND OF ; proof required on issuing ancillary.....	11
—Such letters not void nor to be disregarded in collateral proceeding because proof on which they were granted was defective or irregular, if surrogate acquired jurisdiction.....	11
—Power of attorney to receive such letters properly acknowledged before vice consul of U. S.....	11
AGENCY —When general agent cannot delegate authority or appoint another general agent.....	398
ALIMONY —May be granted wife in action by husband to annul marriage.....	321
ALLOWANCE —See COSTS .	
ANSWER —See PLEADINGS .	

	Page
—Where attachment vacated in part only, the sureties on the undertaking to procure it do not become liable for damages, and this although it was sustained in part because a portion of the property attached had been sold under execution in the same action.....	4
—The practice as to the payment of sheriff's fees and charges upon executing an attachment and the reimbursement of the party paying them, stated.....	148
—When motion to punish party for contempt for failing to pay such fees as required by an order of the court will be denied.	148
—Whether court has power to fix amount of sheriff's fees on attachment or determine who shall pay them, <i>quare</i>	118
—Sheriff has lien upon attached property for his fees, etc., and is not obliged to deliver it to defendant upon vacation of attachment until they are paid.....	148-154
—Sheriff may bring action to procure a sale of such property in satisfaction of his lien.....	154
ATTORNEY —See REFERENCE; SECURITY FOR COSTS.	
ATTORNEY'S LIEN —Attorney where claim was settled after action began and before answer, without satisfying his lien for costs, may, if the defendant fail to answer enter judgment....	44
—Mode of enforcing.....	44
—When attorney's right to costs absolute and not to be defeated by payment to judgment creditor.....	140
BAIL —When duly allowed, the allowance cannot be vacated...	224
—See ARREST.	
BAR —See OFFER OF JUDGMENT.	
BILL OF PARTICULARS —Object of.....	64
—Not ordered when party applying for, knows what his adversary means to rely on.....	64
—Not ordered for the purpose of disclosing evidence.....	64
—Instance of an action of ejectment in which one should not be ordered.....	64
—Will not be ordered where it appears that the defendant who seeks it has more knowledge of the particulars sought by him than plaintiff.....	199
—Instance of an action in which one should be ordered.....	240
—When right to, lost by laches.....	317
—See ACCOUNT.	
BOND —To officer when not forbidden by 2 R. S. 448 § 49.....	418
—When not to officer personally.....	418
—Recitals in, <i>prima facie</i> evidence of the facts set forth.....	418
—Orders as evidence in action on receivers.....	418
—Where a bond was given in an action conditioned for "the payment of any judgment which plaintiff may recover" and he	

	Page
recovered two judgments, payment of one of them will not release bondsmen.....	428
CHAMPERTY AND MAINTENANCE —What constitutes under 2 R. S. 286 § 73.....	418
—Does not exist in this State except as contained in the statutes.....	418
—NOTE ON.....	413
CITY COURT OF NEW YORK —See ATTACHMENT; SECURITY FOR COSTS.	
CODE OF CIVIL PROCEDURE See <i>ante</i> , pp. xxxiii.	
COLLATERAL —See SECURITY.	
COMMISSIONS —See SUREGATE	
COMPLAINT —See PLEADINGS.	
CONTEMPT —Sheriff's fees in proceedings to punish for, to be paid by prosecuting party, when it is a civil, and by county, when a criminal contempt.....	365
—Section 110, <i>et seq.</i> of the Code of Civil Procedure not applicable to proceedings to punish for civil contempt.....	363
—See ATTACHMENT; SUPPLEMENTARY PROCEEDINGS.	
CONTINUING ACTION —See ACTION.	
CONTRACT —See ARREST; ATTACHMENT; SECURITY.	
CORPORATION —Action to set aside alienation of property of, made by its officers and trustees by whom brought.....	230
—Complaint and parties defendant in such action.....	230
—Place of residence of a corporation.....	189
—Foreign, may sue and be sued here, not because it is here but because it acts by agents and may thereby submit itself to the jurisdiction of a foreign tribunal.....	189
—Nature of the right and interest of a stockholder in the corporate property.....	189
—See ATTACHMENT; MUNICIPAL CORPORATION; PLEADINGS; ANSWER.	
COSTS —Argument in Court of Appeals for which, are allowed, may be either oral or written.....	291
—When in a matter of account, the plaintiff is not entitled to, where he recovers less than \$50.....	227
—When Court of Appeals reverses a judgment "with costs to abide the event," the party eventually successful recovers costs for all steps in the action.....	25
—When judgment was modified, and as modified affirmed "with costs to the appellant," "with costs" means costs in the Court of Appeals only.....	25
—The costs of an action for the foreclosure of a mortgage are discretionary.....	25
—Of appeals from surrogate's decree.....	57

	Page
— Surrogate has no power to award or order payment of, except as directed by the appellate court.....	57
— When surrogate may exercise his discretion in reference to the award of costs.....	57
— When plaintiff recovering less than \$50, not entitled to....	311
— Additional allowances not limited to \$2,000 in the aggregate, but to \$2,000 on each side when both parties are successful in an action specified in Section 3,258 of the Code.....	305
— Extra allowance should be computed on amount involved in action.....	365
— See ATTACHMENT; ATTORNEY'S LIEN; DISCONTINUANCE; SECURITY FOR COSTS.	
COUNTER CLAIM —See PLEADINGS, ANSWER.	
COUNTY COURTS —See SUPREME COURT.	
COURT —Cannot decide abstract question of law disconnected from granting of relief....	384
— See CITY COURT OF NEW YORK; COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF N. Y.; COSTS; DISTRICT COURT IN CITY OF NEW YORK; JUSTICE OF THE PEACE; SUPREME COURT; SURREGATE.	
COURT OF APPEALS —See COSTS.	
COURT OF COMMON PLEAS —For the City and County of New York, belongs to class denominated Superior City Courts	79
— Is a county court for certain purposes, but not within the meaning of section 3,268 of the Code.....	79
— See SECURITY FOR COSTS.	
DEATH —See PLEADINGS, COMPLAINT.	
DEFAULT —Defendant moving to open default in failing to answer should serve with his motion papers a copy of his proposed answer.....	44
DEMURRER —See APPEAL; PLEADINGS, DEMURRER.	
DENIALS —See PLEADINGS, ANSWER.	
DISCONTINUANCE —Court has power to discontinue action without costs.....	41
— An infant plaintiff, when may discontinue an action without costs.....	41
— See ARBITRATION; JURISDICTION.	
DISCOVERY —Petition for, of books must state what information is wanted and that the books contain it.....	123
DISTRIBUTIVE SHARE —See SURREGATE.	
DISTRICT COURT —In the City of New York. Judgment debtor cannot file transcript of judgment with county clerk...	220
— See JUSTICE OF THE PEACE.	
DIVORCE —See ALIMONY.	

	Page
EVIDENCE —When the law compels a party to call a witness, he may impeach him.....	443
—See BOND ; EXAMINATION OF PARTY BEFORE TRIAL ; WILL.	
EXAMINATION OF PARTY BEFORE TRIAL —When party may be examined at his own instance before trial.....	338
—Not allowed in U. S. Circuit Court.....	344
—May be continued in action removed to U. S. Circuit Court if begun before removal	344
—Such examination when and how used	344
—When, may be had of plaintiff in action for libel.....	408
—When, not allowed in action founded on tort.....	330
—The fact that questions may be put to a witness on an, which will tend to criminate him, does not justify his refusal to be sworn.....	32
—Order for, should be denied where it will necessarily compel the witness to invoke the protection of the court.....	38
—Should not be allowed when the only issue is the criminality of the witness sought to be examined	38
—Questions which tend to criminate party examined on, or render him infamous, should not be allowed, and he should not be required to plead his privilege as an excuse for not answering.....	408
—Party cannot be examined before trial in any county other than that in which he resides, or has a place of business.....	243
EXECUTION —Plaintiff in, cannot maintain action to prevent or recover for taking away and conversion of property levied upon thereunder.....	179
—May maintain action to remove obstruction to its orderly enforcement and in aid of it... ..	179
—Rights and liabilities of sheriff.....	179
—Effect of stay of proceedings after levy under, and mode of obtaining relief therefrom.....	179
—Form of, where summons served by publication	393
—Share of practicing lawyer in N. Y. Law Institute is exempt from levy and sale under.....	274
—When properly issued out of U. S. circuit court on judgment recovered in U. S. district court.....	1
—May be issued of course within five years after right to issue has fully accrued.....	53
—See “ REPLEVIN. ”	
EXECUTOR AND ADMINISTRATOR —Disputing claim must file written answer.....	218
—Claim of, against his intestate's estate can be paid only on allowance by surrogate.....	370

	Page
—Neither he nor his assignee can maintain action on such claim	370
—May require vouchers, affidavit of creditor and items of claim presented to him before paying or rejecting it.....	398
—See "ACCOUNT;" "ACTION;" "ADMINISTRATION, LETTERS TESTAMENTARY AND OF;" "PARTIES TO ACTION;" "PLEADINGS;" "SECURITY FOR COSTS;" "SURROGATE."	
EXEMPTION —See "EXECUTION."	
FEES —See "ATTACHMENT;" "CONTEMPT;" "COSTS;" "SURROGATE."	
FORECLOSURE —Prior mortgagee properly made party defendant, in action for the foreclosure of a mortgage for the purpose of determining the amount due on his mortgage.....	158
—See "APPEAL."	
GUARDIAN, SPECIAL —When functions of, cease.....	57
—If recognized as guardian <i>ad litem</i> in appellate court entitled to compensation.....	57
HUSBAND AND WIFE —See "ALIMONY."	
INFANT —See "POOR PERSON."	
IN FORMA PAUPERIS —See "POOR PERSON."	
INJUNCTION —Order restraining defendant from interfering with partnership property pending action for dissolution of partnership cannot be made unless plaintiff gives security....	167
—Instance of an injunction <i>pendente lite</i> which should not be vacated.....	53
—See "SUMMARY PROCEEDINGS;" "SUPPLEMENTARY PROCEEDINGS."	
INSPECTION —See "DISCOVERY."	
JUDGMENT —See "ATTORNEY'S LIEN;" "BOND;" "PLEADINGS."	
JURISDICTION —Court not divested of jurisdiction of motion to discontinue action by entry of judgment.....	41
—See "ATTACHMENT;" "ARREST;" "SERVICE BY PUBLICATION."	
JUSTICE OF THE PEACE —To oust a, of jurisdiction in a matter of account on the ground that the accounts exceed \$400, they must exceed that sum exclusive of payments.....	228
—See "DISTRICT COURT IN THE CITY OF NEW YORK."	
LAW —See "STATUTES."	
LEGACY —See "SURROGATE."	
LEVY —See "EXECUTION;" "REPLEVIN."	
LIEN —See "ATTACHMENT;" "ATTORNEY'S LIEN."	
MAINTENANCE —See "CHAMPERTY AND MAINTENANCE."	
MARRIAGE —See "ALIMONY."	
MORTGAGE —See "FORECLOSURE."	

	Page
MOTION —Order for taking deposition to be used on motion can be granted only on application of party to action.....	214
MUNICIPAL CORPORATION —When bound by unauthorized acts of officer or private individual.....	290
—See “PARTIES TO ACTION.”	
N. Y. CITY COURT —See “ATTACHMENT;” “CITY COURT OF NEW YORK.”	
N. Y. LAW INSTITUTE —See “EXECUTION;” “SUPPLEMENTARY PROCEEDINGS.”	
OFFER OF JUDGMENT —When accepted, is a bar to a new action on the claim or a part of the claim set out in the complaint.....	290
ORDER —To whom application to vacate, resettle or modify, should be made.....	293
—See “APPEARANCE;” “APPEAL;” “BOND.”	
ORDER OF ARREST —See “ARREST.”	
PARTIES TO ACTION —Persons claiming money necessary parties defendant in action against officer of municipal corporation to restrain its payment.....	433
—Laws of 1881, chap. 531 does not affect this rule.....	433
—Propriety of making party defendant cannot be determined on motion to strike out allegations of complaint referring to him as irrelevant and redundant.....	333
—A person cannot sue as the administrator of two decedents in one action to recover damages for causing their death.....	296
—Action to set aside alienation of property of corporation made by its officers and trustees, by whom brought.	
—Parties defendant to such action.....	296
PARTITION —When defendant must litigate title in action for..	323
—Action for, cannot be maintained between remaindermen when actual partition cannot be had without great prejudice to owners.....	385
—Purchaser at sale when not compelled to take title.....	385
PARTNERSHIP —See “INJUNCTION;” “RECEIVER.”	
PLEADINGS —What matter in, is irrelevant and redundant....	323
—Matter can be expunged from a pleading for irrelevancy only when it is irrelevant to the cause of action or defense attempted to be stated in the pleading against the moving party; will not be stricken out because they are irrelevant to an alleged cause of action against some other party.....	323
—At least five days notice of a motion for judgment on frivolous pleading must be given.....	18
—Court cannot shorten such time.....	18
—Affidavits cannot be used on such motion.....	18

INDEX.

459

	Page
—In action in U. S. Circuit Court in this state to recover duties illegally exacted, sufficiency of, to be determined by Code of Civil Procedure.....	112
—See "RECEIVER."	
—COMPLAINT. Plaintiff may demand any relief but is not precluded thereby from refusing to take it or asking additional relief.....	126
—Court when controlled by relief demanded, in awarding judgment.....	126
—Ultimate facts only to be stated in complaint.....	112
—Instance of statement of such facts.....	112
—Two causes of action for causing death cannot be united in same complaint.....	286
—Propriety of making party defendant cannot be determined on motion to strike out allegations in complaint referring to him.....	323
—Complaint in action to enforce liability fraudulently contracted must set forth facts showing fraud.....	340
—Form of complaint in action to set aside alienation of property of corporation made by its officers and trustees.....	280
—Complaint in action to recover personal property obtained by fraudulent representations; allegations of ownership and fraudulent intent.....	437
—ANSWER. Instance of an insufficient denial.....	4
—Denial of each and every allegation in "the complaint contained not hereinbefore specifically admitted, qualified or denied" insufficient.....	245
—Denial of "each and every allegation in the complaint not hereinbefore specifically admitted or denied" does not raise an issue.....	428
—Denial, which is neither specific or general, may be disregarded.....	245
—To raise an issue as to the incorporation of a defendant, there must be an affirmative allegation that it is not a corporation...	260
—Denial of nationality insufficient.....	260
—Supplemental answer when allowed.....	349
—Counter-claim founded on tort cannot be set up in action on contract.....	367
—DEMURRER. Instance of demurrer which was not frivolous	18
POOR PERSON —Infant may sue as.....	105
POWER OF ATTORNEY —See "ADMINISTRATION, LETTERS TESTAMENTARY AND OF."	
PREFERENCES —Under general rules of practice are governed by section 793 of the code.....	201
—Right to, waived by noticing cause for trial.....	201

	Page
PRISONER —Sentence to state prison for term less than life does not deprive prisoner of right to defend action against him....	146
PROCEEDING SUPPLEMENTARY TO EXECUTION —See “SUPPLEMENTARY PROCEEDINGS.”	
PUBLICATION —See “EXECUTION;” “SERVICE BY PUBLICATION.”	
RECEIVER —Order appointing, not made on concurrent demands in answer and reply.....	136
—Instance of action to dissolve partnership in which, was properly appointed.....	167
—See “SUPPLEMENTARY PROCEEDINGS.”	
REFERENCE —When ordered in action by attorney for professional service.....	800, 802
REPLEVIN —When property replevied is not in custody of law so as to prevent levy thereon under execution.....	378
—Undertaking given in replevying personal property does not secure or protect judgment creditor of defendant.....	378
—Complaint in action to recover personal property obtained by false and fraudulent representations.....	437
RESIDENCE —Of Corporation.....	189
—See “SECURITY FOR COSTS.”	
SALE —See “PARTITION.”	
SECURITY —The giving of collateral security does not necessarily prevent enforcement of original undertaking.....	150
SECURITY FOR COSTS —A plaintiff cannot be required to give security for costs in the N. Y. Court of Common Pleas because he is a non-resident of the county.....	79
—In a case within section 3208 of the Code defendant's right to, is absolute unless lost by laches.....	80
—Under section 3271 of the Code the court may, in its discretion, require plaintiff to give security for costs.....	80
—When not required in action by administrator.....	80
—Order substituting transferee in place of plaintiff not granted when it will defeat object of order theretofore made requiring plaintiff to give security for costs.....	76
—What must be shown on motion in City Court of New York for, on ground of non-residence.....	104
—When order requiring infant to give, will be vacated.....	105
—When sum deposited as, to be paid to successful party.....	103
—Sum deposited as, to be returned to plaintiff on rendition of judgment in his favor.....	103
—NOTE ON.....	83
—When right to, absolute; when discretionary; laches 82; who must give and when 85; The application and order 97: The security 98; Enforcing the undertaking; excepting to and	

	Page
justification of sureties 99; Additional security 100; Effect of failure to give; Liability of attorney.....	101
SENTENCE TO STATE PRISON —See "PRISONER."	
SERVICE BY PUBLICATION —Proof that defendant cannot be served in State.....	276
—Letters or papers referred to in affidavit to obtain order for, should be annexed.....	276
—See "EXECUTION."	
SHERIFF —Court has no power to renew his liability as bail after he has been regularly discharged from liability.....	224
—See ATTACHMENT; CONTEMPT; EXECUTION; REPLEVIN.	
STATUTE —Rule as to construction of.....	129
—2 R. S. 448 § 49 construed.....	418
—For sections of codes cited and construed, and statutes and laws, etc., cited, see <i>ante</i> , pp. xxix. xxxiii.	
SUBROGATION —See ACTION; SECURITY FOR COSTS.	
SUMMARY PROCEEDINGS —When execution of warrant in, will not be enjoined except in case where proceedings on judgment in action of ejectment would be.....	159
—The cases in which such injunction will be granted, stated..	159
SUMMONS —When may be amended by inserting real names of defendants in place of name under which they did business...	144
SUPPLEMENTARY PROCEEDINGS —Second examination of judgment debtor in, not allowed when similar proceeding in another judgment between the same parties is pending.....	278
—Judgment debtor who expends his earnings for his personal services rendered within sixty days next before the institution of supplementary proceedings, for the support of a family dependent upon him is not guilty of contempt, although the order for his examination contained the usual injunction.....	255
—Motion for receiver in, when denied.....	274
—Money owing to debtor but not due and payable at the time an order in was served, cannot be reached by.....	10
—Share of practicing lawyer in N. Y. Law Institute cannot be reached in.....	274
SUPREME COURT —Will not review discretionary order of a County Court.....	302
SURROGATE —Commissions to testamentary trustees the same as those allowed to executors.....	280
—Amount of, when fund originally less than \$100,000 was increased by income to more than that sum.....	280
—Has power to determine controversy in regard to title, &c., to legacy or distributive share.....	120
—Should decree payment of claim against administrator when no written answer filed.....	218

	Page
—Extent of power of, to direct the application of money in the hands of a temporary administrator	177
—See "ADMINISTRATION, LETTERS TESTAMENTARY AND OF;" "APPEAL;" "COSTS;" "EXECUTOR AND ADMINISTRATOR;" "GUARDIAN, SPECIAL;" "WILL."	
TESTAMENTARY TRUSTEE —See "SURREGATE."	
UNDERTAKING —See "APPEAL;" "ARREST;" "ATTACHMENT;" "BOND;" "REPLEVIN;" "SECURITY FOR COSTS."	
U. S. DISTRICT COURT —See "EXECUTION."	
U. S. CIRCUIT COURT —See "EXAMINATION OF PARTY BEFORE TRIAL;" "EXECUTION;" "PLEADINGS."	
WARRANT OF ATTACHMENT —See "ATTACHMENT."	
WILL —Subscribing witness to, cannot take any greater share in estate thereunder than he would have taken by descent.....	129
—Not invalidated by absence of or defect in attestation clause	441
—What is sufficient acknowledgment and declaration of.....	441
—Proponent not bound by testimony of subscribing witness ..	441
—Testimony of witness to, not controlling.....	441
WITNESS —See "EVIDENCE;" "EXAMINATION OF PARTY BEFORE TRIAL;" "WILL."	

Ex. G. a. a.





